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Florida's New Consumer Finance Act, or, Whatever Happened to "Small" Loan Laws

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FLORIDA'S NEW CONSUMER FINANCE ACT, OR, WHATEVER HAPPENED TO "SMALL" LOAN LAWS

JARRET C. OELTJEN*

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FLORIDA'S NEW CONSUMER FINANCE ACT, OR, WHATEVER HAPPENED TO "SMALL" LOAN LAWS

I. INTRODUCTION

A. General History¹

Throughout history the charging of high interest has been condemned. As early as the twenty-fourth century B.C. the Laws of Manu in India established maximum rates of interest.² The Babylonians, Greeks and Romans likewise wrestled with the problem of the usurer.³ The Bible, at one extreme, condemned the charge of any interest.⁴ By the sixteenth century credit had come into wide use, but was subject to maximum limits.⁵ The historical restrictions are still with us in some form, and today all but two states have general limits to the amount of interest that may be contracted for.⁶ As the demand for consumer and commercial credit grew, both legal and illegal schemes to satisfy the demand and to avoid restrictive laws flourished.

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The assistance in the preparation of this article of Mr. Robert A. Pierce is gratefully acknowledged.

1. See B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 15-82 (1965); Collins, *Evasion and Avoidance of Usury Laws*, 8 LAW & CONTEMP. PROB. 54 (1941); Dellmuth, *Banking's Opportunity to Service the Small Loan Needs of the Public*, 19 LAW & CONTEMP. PROB. 115 (1954); Gisler, *Organization of Public Opinion for Effective Measures Against Loan Sharks*, 8 LAW & CONTEMP. PROB. 183 (1941); Horack, *A Survey of the General Usury Laws*, 8 LAW & CONTEMP. PROB. 36 (1941); Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4 (1954); Hubachek, *The Development of Regulatory Small Loan Laws*, 8 LAW & CONTEMP. PROB. 108 (1941); Kelly, *Legal Techniques for Combatting Loan Sharks*, 8 LAW & CONTEMP. PROB. 88 (1941); Kilgore, *Legislative Tactics of Unregulated Lenders*, 8 LAW & CONTEMP. PROB. 173 (1941); Nugent, *The Loan-Shark Problem*, 8 LAW & CONTEMP. PROB. 3 (1941); Redfield, *The Responsibility of All Consumer Lending Agencies To Help Eliminate the Loan Shark Evil*, 19 LAW & CONTEMP. PROB. 104 (1954); Smith, *What Lies Ahead in the Field of Small Loans*, 19 LAW & CONTEMP. PROB. 120 (1954).

2. The Hindu Institute of Manu established a ceiling of 24%. S. HOMER, A HISTORY OF INTEREST RATES 22-23 (1963), as cited in NAT'L COMM'N ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES 91 n.4 (1972) [hereinafter referred to as CONSUMER CREDIT IN THE U.S.].

3. Babylonia's maximum rates were between 20% and 33 1/3%, depending on the type of commodity loaned. Rome's maximum rate varied from 4 1/6% to 12 1/2%. CONSUMER CREDIT IN THE U.S. 91-92. Athenians fixed the maximum rate at 12%. See generally Horack, *A Survey of the General Usury Laws*, 8 LAW & CONTEMP. PROB. 36 (1941).

4. In Biblical references, usury was any exacting of interest as opposed to mere excessive rates of interest. See, e.g., Deuteronomy 23:19-20; Leviticus 25:35-37; Nehemiah 5:10.

5. CONSUMER CREDIT IN THE U.S. 91.

6. Massachusetts and New Hampshire have no general limits to the amount of interest which may be contracted for. 1 CCH CONSUMER CREDIT GUIDE ¶ 510 (1973). These

The illegal loan shark provided short term, low sum loans when conventional money lenders would not.⁷ The shark, for the most part, was not affected by usury laws because the borrower was often unaware of his rights and was easily harassed into conceding to his "obligation." Even when actions did come to court, legal defenses were hard to prove and the available affirmative remedies were most often civil in nature and required legal counsel, which the debtor usually could not afford.⁸

Early attempts to control the extraction of high interest rates were ineffective primarily because the methods used to describe and to limit the maximum charges were easily avoided by discounts, deductions, fees and special charges.⁹ Finally, in 1907, the Russell Sage Foundation undertook a study of the loan sharking problem.¹⁰ This study recognized the need for small loans to wage earners, and by 1916 the foundation had promulgated and recommended a uniform law. This model established state administrative regulation of small loans and provided a rate of interest lower than that of loan sharks, yet sufficiently high to provide an adequate return for the licensed lender. The model law, which became the Uniform Small Loan Act, has been revised several times, and today every state has some type of consumer loan legislation,¹¹ most of which was directly influenced by the Uniform Act.

B. Florida Small Loan Law

In 1925 the first Small Loan Act was passed in Florida, in recognition of the need for regulation of small loans and in response to the "Loan Sharking evil."¹² The Act basically followed the plan of the Uniform Small Loan Act, but the Florida Legislature limited its applica-

states do, however, have loan laws that regulate specific segments of the market. *Id.* at ¶ 540. See also Foldessy & Phelps, *Hitting the Ceiling*, Wall Street Jour., Aug. 24, 1973, at 1, col. 6.

7. See, e.g., Redfield, *The Responsibility of All Consumer Lending Agencies To Help Eliminate the Loan Shark Evil*, 19 LAW & CONTEMP. PROB. 104, 105 (1954).

8. See, e.g., Kelly, *Legal Techniques For Combatting Loan Sharks*, 8 LAW & CONTEMP. PROB. 88, 90 (1941).

9. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 LAW & CONTEMP. PROB. 108, 111 (1941).

10. The foundation was created for the "improvement of social and living conditions in the United States." Ms. Russell Sage endowed the foundation with \$15,000,000 to carry out its work. In promulgating the Uniform Small Loan Law the Department of Consumer Credit Studies studied the practices of high rate lenders and the effects of state regulation upon them. Gisler, *Organization of Public Opinion for Effective Measures Against Loan Sharks*, 8 LAW & CONTEMP. PROB. 181, 184-85 (1941).

11. 1 CCH CONSUMER CREDIT GUIDE ¶ 540 (1971).

12. Fla. Laws 1925, ch. 10177. The preamble stated that "it is desired to suppress the 'Loan Shark' evil, by authorizing and regulating the conduct of the business of making small loans, upon fair and lawful terms thereby, inducing reputable money-lenders to obtain State licenses."

tion to counties having a population of over forty thousand¹³ and excluded the limitations on wage buying.¹⁴

These weaknesses of the Small Loan Act were eliminated by amendment in 1941¹⁵ after a vicious battle between the organized, syndicated unlicensed lenders and the advocates of effective small loan legislation. The unlicensed lenders lobbied to weaken the small loan law forces by directing charges of legalized loan sharking and through the use of scandal sheets.¹⁶ At this time the small loan lobby was small and lacked the funds to encourage expansion of the coverage of the Act; the lobby also suffered from an unfavorable public image and a general fear of repeal of existing legislation.¹⁷

After the 1941 amendments were enacted the Act remained basically the same¹⁸ until the 1973 legislative session, except for an increase in the maximum allowable loan¹⁹ and a change in the rate of interest that may be extracted.²⁰

The most recent revisions of the Florida Small Loan Law began

13. Fla. Laws 1925, ch. 10177, § 19. The population limitation encouraged the loan shark to operate in the less populous areas where enforcement of usury laws would seemingly be lax and where legitimate sources of loans would be scarce.

14. Section 16 of the Uniform Small Loan Act was left out of the Florida Act. The wage buying technique, which offered a way to extract high rates of interest without violating loan laws, evolved as the result of delayed payments of earned wages by large employers, especially in the Southern states. The delayed payment created a chose in action which could then easily be discounted and not fall within the confines of the Florida Act. The inability of the employee to forfeit his whole pay check to the wage buyer resulted in perpetual indebtedness and a disguised small loan business at rates far above the interest authorized by the Small Loan Act. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 LAW & CONTEMP. PROB. 108, 121 (1941).

15. The population limitation was excluded by Fla. Laws 1941, ch. 20728, § 6. The inclusion of wage buying within the sphere of the Small Loan Act was accomplished by Fla. Laws 1941, ch. 20209. This law stated:

[T]he laws of the State relating to the regulation of the business of lending money and to interest charges and usury are being evaded . . . by the guise of purchasing the wages [and] salaries . . . at discounts far exceeding the rates of interest permitted by law . . . [and] such transactions in substance and effect amount to loans for all practical purposes and the evil of such exorbitant discounts is equivalent to the evil of usurious interest charges . . .

16. Kilgore, *Legislative Tactics of Unregulated Lenders*, 8 LAW & CONTEMP. PROB. 173, 174 (1941).

17. *Id.* "[A] moral stigma attached to any small loan and to both parties to it. As for the lender, the public did not know the difference between licensed lender and loan shark . . . As for the borrower, public opinion generally condemned any borrowing by him as immoral." Smith, *What Lies Ahead in the Field of Small Loans*, 19 LAW & CONTEMP. PROB. 120, 121 (1954).

18. Most modifications of the original Act have dealt with licensing and investigating procedures. See Fla. Laws 1957, ch. 57-201; Fla. Laws 1951, ch. 24869; Fla. Laws 1941, ch. 20728.

19. Fla. Laws 1957, ch. 57-201, § 9.

20. Fla. Laws 1957, ch. 57-201, § 10.

on April 24, 1973, when Senate Bill 835 was introduced and referred to the Commerce and the Ways and Means Committees.²¹ After a hearing in the Commerce Committee, a committee substitute was proposed. The bill, having been withdrawn from the Ways and Means Committee, was forwarded to the Senate floor where several additional amendments were incorporated.²² The committee substitute as amended was passed by the full Senate by a 28 to 7 vote.²³ The bill was then referred to the House of Representatives where it was received and referred to the Finance and Taxation Committee.²⁴ In the meantime, a companion measure to the original Senate bill, House Bill 1775, was considered by the House Business Regulation Committee, where it was substantially amended. After being forwarded by Business Regulation, House Bill 1775 was referred to the Finance and Taxation Committee where it became the basis for further amendments to Senate Bill 835. The committee then reported it to the House where it was placed on the calendar. After much discussion and many amendments, on May 23, 1973, the House passed the amended bill by a 90 to 20 vote.²⁵

Before becoming law the bill went back to the Senate for approval of the House amendments which in turn were further amended,²⁶ again to the House for amending and approval of the Senate's amendments,²⁷ and finally back to the Senate for concurrence.²⁸ On June 1 the bill was finally forwarded to the Governor's office where it became law without his signature.²⁹

C. Florida Consumer Finance Law

In 1949 the Florida Consumer Finance Law was passed,³⁰ creating a dual system of small loan laws in Florida. The Consumer Finance Law was almost identical to the original Small Loan Act except for the method utilized to compute interest and charges.³¹ The effective interest rate which could be charged under the Consumer Finance Law, however, was several percent less than that authorized by the Small

21. FLA. S. JOUR. 245 (1973).

22. The various versions and the proposed amendments will be discussed in the appropriate sections *infra*.

23. FLA. S. JOUR. 417 (1973).

24. FLA. H.R. JOUR. 616 (1973).

25. FLA. H.R. JOUR. 783 (1973).

26. FLA. S. JOUR. 528 (1973).

27. FLA. H.R. JOUR. 813-15 (1973).

28. FLA. S. JOUR. 569 (1973).

29. Fla. Laws 1973, ch. 73-192, § 16.

30. Fla. Laws 1949, ch. 25343.

31. See pp. 379-87 *infra*.

Loan Law.³² When both acts were amended in 1957, some of the discrepancy was eliminated.³³

The reasons for enacting the parallel provisions can only be surmised since the "declaration of legislative intent" gives little assistance.³⁴ By viewing the list of registrants under the Consumer Finance Law,³⁵ one notes large numbers of national companies and is led to speculate that the legislation was enacted as a convenience to those companies, who might wish to state and compute interest in ways not authorized by the original Small Loan Act.

With the 1973 amendments, Florida again has only one Small Loan Act. The 1949 Consumer Finance Law has been repealed³⁶ and registrants thereunder will be converted to licensees under the amended Small Loan Act.³⁷ The new, all inclusive Act is named the "Florida Consumer Finance Act."³⁸

To avoid confusion, the newly amended Act will be referred to as the Consumer Finance Act (CFA);³⁹ the unamended Act, in effect until the 1973 amendments become law, will be referred to as the Small Loan Act (SLA); the former Consumer Finance Law which was originally enacted in 1949 will be referred to as chapter 519.

II. FINANCE CHARGE AND PRINCIPAL AMOUNT

A. Explanation

"The representations with reference to charges now being made by banks, discount companies, and sales finance companies constitute a veritable babble of tongues."⁴⁰ The Florida small loan situation is no different. The SLA provided that its licensees

32. Compare FLA. STAT. § 519.08 (1949), with FLA. STAT. § 516.14 (1949).

33. Compare FLA. STAT. § 519.08 (1957), with FLA. STAT. § 516.14 (1957).

34. The legislative intent is set forth in the statute:

It is the intent of the legislature in enacting this law to create the business of discount consumer credit financing with respect to the business of making certain loans, and to bring under effective supervision those engaged in the business of discount and installment loans, to establish a system of regulation for the purpose of insuring honest and efficient finance service, to fix reasonable charges for borrowers, to permit a fair return, and to provide the administration necessary for effective enforcement.

FLA. STAT. § 519.02 (1971).

35. COMPTROLLER OF FLORIDA, DISCOUNT CONSUMER FINANCING AND SMALL LOAN ANNUAL REPORTS (1972) [hereinafter referred to as ANNUAL REPORTS].

36. Fla. Laws 1973, ch. 73-192, § 15.

37. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.34).

38. Fla. Laws 1973, ch. 73-192, § 1.

39. The effective date of the Act is October 1, 1973.

40. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 LAW & CONTEMP. PROB. 108, 132 (1941).

may charge, contract for and receive thereon interest at a rate not to exceed three percent per month on that part of the unpaid principal balance not exceeding three hundred dollars and two percent per month on that part of the unpaid balance in excess of three hundred dollars but not exceeding six hundred dollars, provided that at the expiration of a period of twelve months following the last contractual installment date the interest on any balance still unpaid shall not exceed ten percent per year. Interest shall not be payable in advance or compounded and shall be computed on unpaid balances on the basis of the number of days actually elapsed and, for the purpose of such computations, a month shall be any period of thirty consecutive days.⁴¹

Chapter 519 was even less clear. Registrants thereunder could collect

[a]n initial charge in an amount not exceeding ten dollars per one hundred dollars of the amount of the loan, repayable over a period of one year, and proportionately at that rate for a greater or lesser sum or for a longer or shorter period, which charge may be computed on the amount of the loan from date thereof until date of maturity of the final installment notwithstanding any agreement to pay the loan obligation in installments, such charge to be added to the amount of the loan at the time it is made, and two dollars on each ten dollars of this charge shall constitute, in whole or in part, reimbursement of expenses incurred and compensation for services rendered in connection with the making of the loan and the remainder of the initial charge shall be interest⁴²

Chapter 519 registrants could collect, in addition,

[a] monthly service charge, to cover services rendered and expenses incurred in connection with the loan transaction, [which] may be contracted for and collected until the loan is fully paid for each month, and the fraction of a month at the end of the loan, provided such charge shall not be in excess of twenty cents for each full twenty-five dollars of the original loan obligation and not in excess of two dollars and forty cents per month. Such service charge shall not be collected at the time the loan is made, provided, however, the service charge covering the number of monthly payments required by the loan contract may be aggregated and included in the face amount of the loan obligation.⁴³

41. FLA. STAT. § 516.14(1) (1971). The highest rate of interest that could be charged for twelve thirty-day months, or a 360-day year, was 36%. For a calendar year of 365 days the rate would be about 36.5%.

42. FLA. STAT. § 519.08(1) (1971).

43. FLA. STAT. § 519.08(2) (1971).

Thus, for a \$300 loan, the charge, consisting of "interest," "reimbursement of expenses incurred and compensation for services rendered" and "monthly service charge," was approximately 34½%.

Even with the combination of the SLA and chapter 519 into the CFA, clarity did not completely prevail.

The licensee may charge, contract for, and receive thereon, interest charges as provided and authorized by this section. The maximum interest rate shall be thirty percent (30%) per one hundred dollars (\$100.00) per annum computed on the first three hundred dollars (\$300.00) of the principal amount as computed from time to time, twenty-four percent (24%) per one hundred dollars (\$100.00) per annum on that part of the principal amount as computed from time to time exceeding three hundred dollars (\$300.00) and sixteen percent (16%) per one hundred dollars (\$100.00) per annum on that part of the principal amount as computed from time to time exceeding six hundred dollars (\$600.00). The original principal amount as used in this section shall be the same amount as the amount financed as defined by the federal truth-in-lending act and regulation Z of the board of governors of the federal reserve system. In determining compliance with the statutory maximum interest and finance charges set forth herein, the computations utilized shall be simple interest, and not add-on interest or any other computations.⁴⁴

Several additional provisions add to the confusion: one excludes "other charges" except certain fees;⁴⁵ one⁴⁶ ties the finance charge that may be

44. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(1)).

45. The "other charges" exclusion provides:

In addition to the interest and insurance charges . . . provided for, no further or other charges or amount whatsoever for any examination, service, brokerage, commission or other thing or otherwise shall be directly or indirectly charged, contracted for or received, except the documentary excise tax and lawful fees, if any, actually and necessarily paid out by the licensee to any public officer for filing or recording or releasing in any public office, any instrument securing the loan, which fees may be collected when the loan is made or at any time thereafter, or actual and reasonable attorney fees as determined by the court in which suit is filed and court costs, including actual and reasonable expenses of repossession, storing and selling of any property pledged as security, as determined by the court in which suit is filed.

Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(5)).

46. The provision states:

The annual percentage rate of finance charge which may be contracted for and received under any loan contract made by a licensee under this chapter may equal but may not exceed the annual percentage rate which must be computed and disclosed as required by the federal truth-in-lending act and regulation Z of the board of governors of the federal reserve system. The maximum annual percentage rate of finance charge which may be contracted for and received is twelve (12) times the maximum monthly rate and the maximum annual rate shall be computed on the

contracted for to the provisions of the Federal Truth in Lending Act⁴⁷ and Regulation Z;⁴⁸ another defines interest as including any "profit or advantage" received by the licensee with the exception of insurance commissions.⁴⁹ Finally, there are provisions in the CFA⁵⁰ and the insurance code⁵¹ which exempt credit life and disability insurance from the "interest" charge.

The CFA rate section, read in the light of the other cited provisions, seems to have the following meanings:

(1) The "finance charge" that may be collected under the CFA shall not exceed the finance charge that is required to be disclosed under Truth in Lending.

(2) Since "finance charge" is not defined under the CFA, the use of that term to describe charges under the CFA requires the same meaning as when using the term "finance charge" to describe charges to be disclosed under Truth in Lending.

(3) Under Truth in Lending, "finance charge" is defined as follows:⁵²

(a) . . . Except as otherwise provided in this section, the amount of the finance charge in connection with any consumer credit transaction

basis of one-twelfth (1/12) of the annual rate for each full month. The department shall by regulation establish the rate for each day in a fraction of a month when the period for which the charge is computed is more or less than one (1) month.

Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(4)).

47. Consumer Credit Protection Act, 15 U.S.C. §§ 1601-65 (1970) [hereinafter referred to as CCPA, with corresponding U.S. Code section].

48. Fed. Res. Bd. Reg. Z, 12 C.F.R. §§ 226.1-1002 (1972) [hereinafter referred to as Reg. Z].

49. This provision states:

Any profit or advantage of any kind whatsoever that any licensee may contract for, collect, receive or in anywise obtain by a collateral sale, purchase, or agreement, in connection with any loan regulated by this chapter shall be deemed to be interest or consideration for the purposes of regulation under this chapter. Such transactions shall be governed by and subject to the provisions of this chapter, except commissions received as a person licensed by the department of insurance on insurance written as hereinafter permitted, shall be deemed to be interest or consideration for the purposes of regulation under this chapter. However, security consisting of tangible property offered as security may be reasonably insured against loss for a reasonable term, considering the circumstances of the loan, and such insurance shall not be deemed such collateral sale, purchase, or agreement when the policy is payable to the borrower or any member of his family, even though the customary mortgagee clause is attached or the licensee is a coassured; provided, that such insurance is sold at standard rates through a person duly licensed by the department of insurance.

Fla. Laws 1973, ch. 73-192, § 10 (§ 516.20(1)).

50. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.35).

51. FLA. STAT. § 627.684 (1971).

52. CCPA § 1605. Sections 1605(b) and (c) have been omitted here but will be discussed in section V *infra*.

shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable:

- (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges.
- (2) Service or carrying charge.
- (3) Loan fee, finder's fee, or similar charge.
- (4) Fee for an investigation or credit report.
- (5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.

....

(d) . . . If any of the following items is itemized and disclosed in accordance with the regulations of the Board in connection with any transaction, then the creditor need not include that item in the computation of the finance charge with respect to that transaction:

- (1) Fees and charges prescribed by law which actually are or will be paid to public officials for determining the existence of or for perfecting or releasing or satisfying any security related to the credit transaction.
- (2) The premium payable for any insurance in lieu of perfecting any security interest otherwise required by the creditor in connection with the transaction, if the premium does not exceed the fees and charges described in paragraph (1) which would otherwise be payable.
- (3) Taxes.
- (4) Any other type of charge which is not for credit and the exclusion of which from the finance charge is approved by the Board by regulation.

Thus "finance charge" includes not only "interest" but some "other charges" to the debtor as well.

(4) "Other charges" which are to be included within the "finance charge," *e.g.*, investigation, brokerage or service fees, cannot, under the CFA, be charged to the debtor (with the exception of insurance)⁵³ if the maximum "interest" charge has already been assessed.⁵⁴

(5) Items which may be excluded from the "finance charge" if separately itemized and disclosed, may, under the CFA, be charged to the debtor in addition to interest and insurance charges.⁵⁵

53. The provisions on insurance will be discussed in section V *infra*.

54. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(5)).

55. *Id.*

(6) To compute the maximum allowable "interest" charge, the "principal amount" upon which the charge is computed shall equal the "amount financed" under Truth in Lending.

(7) The "amount financed" is "[t]he amount of credit . . . which will be paid to the customer or for his account or to another person on his behalf, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge"⁵⁶

(8) The "other charges," which may be charged under the CFA, must be added to the "principal amount" when determining the maximum allowable "interest charge."⁵⁷

(9) The language "the computations utilized shall be simple interest and not add-on interest or any other computations" means the same as "annual percentage rate" (APR) under Truth in Lending, which is defined as

that nominal annual percentage rate which will yield a sum equal to the amount of the finance charge when it is applied to the unpaid balances of the amount financed, calculated according to the actuarial method of allocating payments made on a debt between the amount financed and the amount of the finance charge, pursuant to which a payment is applied first to the accumulated finance charge and the balance is applied to the unpaid amount financed⁵⁸

Illustration I charts the operation of this method on a \$300 loan at 30% "simple interest" or APR to be repaid in equal monthly installments over a term of twelve months.

Unlike the SLA⁵⁹ or chapter 519,⁶⁰ the CFA does not clearly specify a method which must be followed by the licensees in setting up their consumer accounts. The two common possibilities are the outstanding balance method and the precomputation method. In the former, a ledger card is kept and each time a payment is made, the payment is divided between interest (computed on the outstanding principal balance) and principal; *i.e.*, the ledger card would look very similar to

56. Reg. Z, § 226.8(d)(1).

57. The following costs would not be part of the credit extended and would thus be neither part of the "finance charge" nor part of the "amount financed": "actual and reasonable attorney fees as determined by the court in which suit is filed and court costs, including actual and reasonable expenses of repossession, storing and selling of any property pledged as security, as determined by the court in which suit is filed." Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(5)).

58. CCPA § 1606(a)(1)(A).

59. FLA. STAT. § 516.14 (1971) (outstanding balances).

60. FLA. STAT. § 519.08 (1971) (precomputed).

ILLUSTRATION I

Month	Unpaid Balances Outstanding During Month	Application of \$29.25 Monthly Payments	
		Charges	Principal
1	\$300.00	7.50	21.75
2	278.25	6.96	22.30
3	255.95	6.40	22.85
4	233.10	5.83	23.42
5	209.68	5.24	24.01
6	185.67	4.64	24.61
7	161.06	4.03	25.22
8	135.84	3.40	25.85
9	109.99	2.75	26.50
10	83.49	2.09	27.16
11	56.33	1.41	27.84
12	28.49*	.71	28.54*

* The \$.05 difference is occasioned by the failure to carry the computations out to more than 2 decimal places.

Illustration I. If using the precomputation method the consumer debtor's ledger would show one balance which includes precomputed interest charges and principal. Each time a payment is made, it is deducted from the balance. The balance then indicates the total remaining indebtedness if the obligation is paid according to schedule.

Although it could be argued that the CFA language, "as computed from time to time" and "simple interest, and not add-on interest or any other computations," would specify the outstanding balance method, it could just as ably be argued that the quoted language is merely to safeguard the way the "interest" is to be computed for rate regulation purposes and not how the ledgers are going to be set up. In fact, the Uniform Consumer Credit Code (UCCC) provides:

[The rate] section does not limit or restrict the manner of contracting for the credit service charge, whether by way of add-on, discount, or otherwise, so long as the rate of the credit service charge does not exceed that permitted by this section.⁶¹

The Department of Banking and Finance (hereinafter referred to as the Department) has settled the argument by requiring, by regulation,

61. UNIFORM CONSUMER CREDIT CODE § 2.201(3) (1968) [hereinafter referred to as UCCC].

that the outstanding balance method be utilized.⁶² Although the CFA does not seem to mandate such a rule, for the sake of uniformity it is probably a wise one.⁶³

B. Rates and Principal Amounts

The CFA increased the size of loans that licensees could offer at rates above the general usury limitation, but it lowered the maximum permissible interest. The following chart compares the various annual percentage rates under prior law and the CFA.

ILLUSTRATION II

	\$0-300	\$300-600*	\$600-2500**
SLA	36.5%	24.33%	10%***
Ch. 519	34.5%	18%	10%***
CFA	30%	24%	16%

* Maximum principal under SLA and ch. 519.

** Maximum principal under CFA.

*** General usury rate under Florida Statutes ch. 687.

The arguments for the increased loan limits were numerous and varied; the most frequent and perhaps emotional argument suggested that under the old law a customer who needed a \$1200 or an \$1800 loan would have to go to several finance companies, borrowing \$600 or less at each at the maximum rates, which in most cases would mean that his loan would cost him at least 30%. If the Act were amended to allow a company to loan him the full amount, the loan could be extended at reduced rates because it costs nearly as much to administer a \$600 loan as it does an \$1800 loan, administrative costs constituting a large portion of the expenses that finance companies are subjected to.⁶⁴ This "need" for higher limits is further amplified by the inflationary trend that not only has caused the relative worth of \$600 to shrink but also has driven up loan administration costs.⁶⁵ Nor is the increase in limits a local phenomenon—only six states are at the \$600 limitation or less, whereas double that number are at \$3,000 or more. The most

62. DEPT. OF BANKING AND FINANCE, FLORIDA CONSUMER FINANCE ACT RULES ch. 3-2 to 3-2.17 (Aug. 27, 1973) [hereinafter referred to as RULES].

63. It was suggested in 1941 that the statutory schemes should use the all-inclusive percentage rate applied strictly to the unpaid balances. Hubachek, *The Development of Regulatory Small Loan Laws*, 8 LAW & CONTEMP. PROB. 108, 111 (1941).

64. See CONSUMER CREDIT IN THE U.S. 139-45.

65. Several of these arguments were already being made in 1954. See Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 14-16 (1954).

popular range is from \$1,000 to \$3,000, with a \$2,500 limit being the most common.⁶⁶

As a tradeoff to obtain these higher loan limits, the finance companies were subjected to a lowering of the permissible finance charges⁶⁷ and were deprived of the advantages of several remedies and collection devices which they had possessed.⁶⁸ Both these changes have a direct and constricting influence on the gross income of the finance companies, but this loss in income can be offset by increasing the average loan size. This increase in loan size will decrease the percentage of income which is needed for administration. If it costs \$25 to administer a loan, whether it be for \$500 or \$1000, the administration cost per dollar loaned for the \$500 loan would be double that for the \$1000 loan.⁶⁹ Likewise, companies can offset these increased costs by reducing their bad debt losses. The surest way to reduce the percentage of bad debts is to decrease the average credit risk of the borrowers. This would be done by denying loans to those borrowers who are marginal credit risks.

The result of these changes is going to be highly advantageous to relatively low risk borrowers, but to the marginal credit risk it is bound to have detrimental effects. Either he is going to be forced to borrow more money than he really needs so that loan costs can be recouped, or he will be denied credit in the legal market.⁷⁰ Either result seems to frustrate the very intent of the original small loan acts, which was to give necessitous borrowers a legal source of short term, low principal loans.⁷¹

III. PAYMENT SCHEDULE DURATION

A further limitation on licensees and borrowers is the restriction on the duration of payment schedules. All three of the acts, the SLA,⁷² chapter 519⁷³ and the CFA,⁷⁴ contain such restrictions. If the duration

66. 1 CCH CONSUMER CREDIT GUIDE ¶ 540 (1970).

67. See Illustration II *supra*.

68. See discussion of consumer protection in section VIII *infra*.

69. See CONSUMER CREDIT IN THE U.S. 139-45.

70. *Id.* at 109-49. It is interesting to note in the range of smallest loans, \$300 or less, where the administrative costs per dollar loaned are the greatest, the legislature made the greatest cuts in rate. At the other end of the spectrum, where the loans are the largest and the costs per dollar loaned are the least, there were either small rate decreases or an increase.

71. The National Commission on Consumer Finance suggests economic justification for rates as high as 94.66% on a \$100 loan and as low as 13.98% on a \$3,000 loan. *Id.* at 141-45. Texas has made special provision for loans under \$100. TEX. REV. CIV. STAT. ANN. art. 5069-3.16 (1971).

72. FLA. STAT. § 516.20(2) (1971).

73. FLA. STAT. § 519.10(2) (1971).

74. Fla. Laws 1973, ch. 73-192, § 10 (§ 516.20(2)).

of the repayment schedule is too long, the debtor will be misled by the smallness of the payments and will be saddled with low payment and high total interest charges over a long period of time. If, on the other hand, the duration is too limited, the payments necessary to pay off the loan will be so high as to realistically put the loan out of reach of many necessitous borrowers.

The CFA provides:

No licensee shall enter into any contract for a loan under this chapter for six hundred dollars (\$600.00) or less which provides for scheduled repayment of principal more than twenty four (24) months and fifteen (15) days from the date the loan is made, nor enter into any contract for a loan under this chapter for more than six hundred dollars (\$600.00) which provides for scheduled repayment of principal more than thirty six (36) months and fifteen (15) days from the date the loan is made.⁷⁵

The twenty-four month limitation for \$600 or less is basically the same as prevailed under the SLA and chapter 519, and has seemed to work quite well. But the thirty-six month limitation may prove to be too short and thus act as a restriction on the availability of credit. For example, a maximum loan of \$600 at the maximum CFA rates may be paid back in twenty-four monthly installments of about \$35 per month; but a \$2,500 loan at maximum CFA rates must be paid back in thirty-six months with payments of about \$93.

This provision also creates an interesting problem of interpretation which is raised by the following hypothetical:

Debtor borrows \$2,500 and is charged the maximum legal rate of interest, 30%, 24% and 16%. His payment schedule is set up for the maximum thirty-six months and fifteen days. Because of his slow payments, there is unpaid principal due at the end of the thirty-six months. Six months after the final installment was due, Debtor decides to pay his account in full. What rate of interest can be charged for the six month period?

There is nothing in the Act which authorizes over 10% to be charged beyond the thirty-six month limitation. In fact, it provides:

No person shall engage in the business of making loans of money, credit, goods or choses in action in the amount, or to the value of two thousand five hundred dollars (\$2,500.00) or less, and charge, contract for, or receive a greater rate of interest than ten percent (10%)

75. *Id.*

per annum therefor, except as authorized by this chapter and without first obtaining a license from the department, or except as authorized by other statute of this state.⁷⁶

Thus the inevitable conclusion is that the creditor is limited to the general usury rate of 10% if the debtor does not pay according to schedule and drags out payments beyond the statutory maximum duration.

Similar statutory language in the SLA was construed by the Florida Supreme Court in 1956; the court concluded that the higher SLA rate could not extend beyond the statutory duration limit.⁷⁷ In 1957, the Florida Legislature amended the SLA rate section to provide in part "that at the expiration of a period of twelve months following the last contractual installment date the interest on any balance still unpaid shall not exceed ten percent per year."⁷⁸ This 1957 revision has been interpreted by the Florida attorney general as qualifying the earlier supreme court decision.⁷⁹

A plain reading of these statutes lends credence to the position that the statutory 2%-3% per month interest rate would be lawful up to 12 months after the last installment date. It is precisely at that time that the 10% per annum rate is expressly required by legislative pronouncement. It is difficult to discern any other reason for the aforementioned language

By failing to reenact the language of the 1957 amendment, it must surely be concluded that the legislature intended that the 30%-24%-16% rate not be utilized beyond the duration limit.

IV. DELINQUENCY CHARGES

A delinquency charge is an additional assessment made on credit transactions because payment is made later than the due date specified in the contract or loan agreement. The assessment of a delinquency charge is justified on the basis that (1) the interest charges were computed on the assumption that installments would be paid according to contractual schedule; (2) following a "grace period" of five to ten days after the due date, the creditor must transfer the contract or loan agreement to his collection department, so the charge offsets the cost of special handling that would otherwise be imposed on all debtors; and

76. Fla. Laws 1973, ch. 73-192, § 2 (§ 516.02). *See also* Fla. Laws 1973, ch. 73-192, § 9 (§ 516.18(1)).

77. *Vann v. Accounts Supervision Co.*, 88 So. 2d 548 (Fla. 1956).

78. Fla. Laws 1957, ch. 57-201, § 9 (§ 516.14(1)).

79. FLA. OPS. ATT'Y GEN. 072-100, at 3 (1972).

(3) the contract is technically in default at the end of this grace period, so the delinquency charge is a convenient method of motivating payment, without the expense of going to court over what may prove to be a simple oversight on the part of the debtor.

The SLA had no provision for the assessment of delinquency charges on late payments. Since loans under this Act were not precomputed, the debtor was by the terms of the agreement penalized for any late payment, as a greater portion of that payment would be consumed by accrued interest charges.

Chapter 519 authorized the assessment of delinquency charges following a minimum grace period of five days after the due date.⁸⁰ The delinquency charge under this Act could only be assessed one time with respect to any particular installment, a limitation which prevented one of the methods of compounding such charges. The amount of the delinquency charge under this Act was limited to five cents on each whole dollar of the amount of the unpaid installment.⁸¹

The CFA provides for delinquency fees as follows:

A licensee may, if agreed to in writing, contract for, impose and collect a delinquent charge of five cents (\$.05) per dollar for each full dollar of an installment which is delinquent for ten (10) or more days, which charge may be imposed only once on each delinquent installment. A charge under this subsection shall be in lieu of all other delinquent or deferral charges.⁸²

If the interest is to be precomputed, such charges seem justified to compensate the licensee for the extra trouble he may be put to and to charge the debtor for the extra time he has the use of the overdue payment. If the interest is to be computed on the outstanding balance at the time of each payment, however, the creditor is already being compensated for the additional use of this money, so the assessment of a delinquency charge could be viewed as an extra charge. To remain consistent with its requirement that interest not be precomputed but should be determined on the outstanding balances,⁸³ the Department has promulgated a rule which, in effect, destroys the "bite" of the delinquency provisions.

Any charge which a licensee may impose or collect pursuant to [the

80. FLA. STAT. § 519.08(4) (1971).

81. *Id.*

82. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(2)). UCCC §§ 2.203, 3.203, and the National Consumer Act § 2.204 (1970) [hereinafter referred to as NCA] likewise authorize delinquency charges.

83. See note 62 and accompanying text *supra*.

provisions on delinquency fees] shall for all purposes be considered interest and shall be subject to the maximum rates provided and authorized by [the CFA].⁸⁴

To prevent the pyramiding of delinquency charges, the CFA provides that "[p]ayments shall be applied first to current installments [*sic*], then to past-due installments, and then to delinquency charges, if any."⁸⁵

V. INSURANCE WRITTEN IN CONNECTION WITH CONSUMER CREDIT TRANSACTIONS

The prohibition against extra charges in the small loan law is in such sweeping terms that it should be construed to prohibit credit insurance charges, except in a few states where they are specifically authorized.⁸⁶

Florida is one such state where the licensee, in addition to the legislatively established interest charges, may obtain additional revenue through the sale of various forms of credit insurance.⁸⁷ The rules regarding life and disability insurance vary from those regulating hazard insurance, so these two classifications will be discussed separately.

A. Casualty Insurance⁸⁸

The CFA authorizes the licensee to require insurance on security "consisting of tangible property." Likewise, "commissions received as a person licensed by the department of insurance on insurance written" pursuant to such authority shall not be considered "interest."⁸⁹

In addition to the insurance licensing requirements,⁹⁰ the seller of such insurance is subject to the anti-coercion statute which, while reenforcing the right to require insurance, prohibits the specification

84. RULES § 3-2.15.

85. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(2)). Without such a provision, if the debtor pays his contracted installment of \$50 twelve days late, the creditor assesses the delinquency fee of 5% (\$2.50); if the debtor pays the next month's payment of \$50 on time but does not pay the \$2.50, and the creditor deducts the \$2.50 from the \$50 payment, the debtor will again be delinquent on a portion of an installment, and the process repeats itself.

86. Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 18 (1954).

87. "In addition to the interest and insurance charges herein provided for . . ." Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(5)) (emphasis added).

88. "Casualty insurance" is defined in FLA. STAT. § 624.605 (1971).

89. Fla. Laws 1973, ch. 73-192, § 10 (§ 516.20(1)).

90. FLA. STAT. § 626.321 (1971).

of any particular agent, solicitor or insurer.⁹¹ Thus, the licensee *can* require property damage and liability insurance but *cannot* require that the insurance be purchased from him or any other particular source.⁹²

B. Credit Life and Disability Insurance

In continuing the policy of the SLA and chapter 519,⁹³ the CFA authorizes the licensees thereunder to provide credit life and disability insurance, subject to the provisions of the insurance code.

Credit life and disability insurance which is provided at the expense of borrowers must be provided only under a group or individual insurance policy which complies with sections 627.676 through 627.683 and 627.685, Florida Statutes, and lawful regulations thereunder. The cost of credit life and disability insurance which is paid by borrowers shall be deducted from the principal amount of the loan and shall be disclosed on the statement required by section 516.15(1), Florida Statutes, or a combined note and disclosure statement required by federal truth in lending act.⁹⁴

The provisions of the insurance code authorize the issuance of special licenses to "an individual employed by or associated with a lending or financing institution or creditor," but the sale of such insurance is authorized "only with respect to borrowers or debtors of such lending or financing institution or creditor."⁹⁵ The code also provides:

The premium or cost of credit life or disability insurance, when written by or through any lender or other creditor, its affiliate or as-

91. FLA. STAT. § 626.960 (1971).

92. The Federal Truth in Lending Act achieves basically the same result by providing that the premiums

shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended, setting forth the cost of the insurance if obtained from or through the creditor, and stating that the person to whom the credit is extended may choose the person through which the insurance is to be obtained.

CCPA § 1605(c).

93. The right of an SLA licensee or chapter 519 registrant to sell life or disability insurance, in the face of inconsistent statutory provisions in those chapters and the insurance code, was established by the case of *Dickinson v. Buck*, 220 So. 2d 48 (Fla. 1st Dist. Ct. App. 1969). In the *Buck* case, the plaintiff sought a declaratory judgment that he had the statutory right to sell credit life insurance and that the premiums for such insurance would not be considered part of the finance charge. The court of appeal affirmed the lower court's decision that he had such a right; the effect of that decision is now embodied in FLA. STAT. § 627.684 (1971).

94. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.35).

95. FLA. STAT. § 626.321(1)(e) (1971).

sociate or subsidiary or a director, officer or employee of any of them *shall not be deemed as interest or charges or consideration* or an amount in excess of permitted charges in connection with the loan or credit transaction and any gain or advantage to any lender or other creditor, its affiliate, associate or subsidiary or a director, officer or employee of any of them, arising out of the premium or commission or dividend from the sale or provision of such insurance shall not be deemed a violation of any other law general or special, civil or criminal of this state, or of any rule, regulation or order issued by any regulatory authority.⁹⁶

It could be argued, however, that this provision is not applicable since it is not expressly included within the insurance references enumerated in the CFA,⁹⁷ but it is doubtful that any court would so hold because the references have likewise omitted the insurance licensing provisions⁹⁸ which surely were not intended to be excluded. Furthermore, the language of the CFA seems to be aimed at merely the form of the policy and the conditions under which it is to be issued rather than at the status of the charges therefor.⁹⁹

Furthermore, the life and disability anti-coercion statute exempts credit life and disability insurance from its operation,¹⁰⁰ and there is no other Florida statute prohibiting creditors from conditioning the granting of credit on the purchase of credit life or disability insurance from their employee or associate. Thus, in Florida, a small loan licensee can sell credit life and disability insurance, can require that the debtor purchase such insurance and can condition the grant of credit on the purchase of such insurance from an employee or associate of the licensee. For this service the licensee can charge premiums in addition to the authorized "interest" charge.

In the situation where the creditor requires the purchase of insurance as a prerequisite to the granting of credit, the CFA may contain a serious inconsistency. For the purposes of rate regulation, the premium would be excluded from the "interest" charge; but because of the tie with Truth in Lending, it would be included in the "finance charge."¹⁰¹ At this point there is no conflict because the CFA merely

96. FLA. STAT. § 627.684 (1971) (emphasis added).

97. Compare FLA. STAT. § 627.684 (1971), with Fla. Laws 1973, ch. 73-192, § 12 (§ 516.35) ("sections 627.676 through 627.683 and 627.685").

98. E.g., FLA. STAT. § 626.321(1)(e) (1971).

99. "Credit life and disability insurance . . . must be provided only under a group or individual insurance policy which complies with sections 627.676 through 627.683 and 627.685 . . ." Fla. Laws 1973, ch. 73-192, § 12 (§ 516.35).

100. FLA. STAT. § 626.961 (1971).

101. The CCPA states:

Charges or premiums for credit life, accident, or health insurance written in

limits the rate of "interest"¹⁰² which may be charged and not the "finance charge," which includes within its definition not only interest but other charges such as insurance.¹⁰³ Thus, the rate of "interest" may be 30%, in compliance with the appropriate provisions of the Act, while the APR of the "finance charge" may be 31½% or higher. A problem does arise, however, when one considers the requirement that "[t]he cost of credit life and disability insurance which is paid by borrowers shall be deducted from the principal amount of the loan,"¹⁰⁴ which assumes that the premium was part of the principal amount. "Original principal amount" is to be the same as the "amount financed" under Truth in Lending.¹⁰⁵ Yet under Truth in Lending in the questioned situation, the insurance premium would not be part of the "amount financed" but would instead be included in the "finance charge."¹⁰⁶

The first way to eliminate the conflict is to argue that the legislature, by implication, prohibited licensees from requiring as an incident to the granting of credit, purchase of credit life or disability insurance. This may be a difficult position to take because the insurance code provisions are unchanged and are even referred to in the statute. The other possibility is to assert that the terms "principal amount," as used in the insurance section, and "original principal amount," which is tied to Truth in Lending, are not synonymous. As used in the insurance section, "principal amount" merely evidences the source of payment of the insurance fees and has nothing to do with the method of computing rates and charges.

The wisdom, however, of permitting the creditor to require credit life and disability insurance is frequently questioned and condemned.¹⁰⁷

It was contended that credit insurance is necessary and that borrowers usually want it when offered. Both contentions disregard the fact that

connection with any consumer credit transaction shall be included in the finance charge unless

(1) the coverage of the debtor by the insurance is not a factor in the approval by the creditor of the extension of credit, and this fact is clearly disclosed in writing to the person applying for or obtaining the extension of credit; and

(2) in order to obtain the insurance in connection with the extension of credit, the person to whom the credit is extended must give specific affirmative written indication of his desire to do so after written disclosure to him of the cost thereof.

CCPA § 1605(b).

102. See Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(1)); see p. 381 *supra*.

103. CCPA § 1605; Note 101 *supra*.

104. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.35).

105. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(1)); see p. 381 *supra*.

106. CCPA § 1605; see note 101 *supra*.

107. See, e.g., CONSUMER CREDIT IN THE U.S. 85-86; Davis, Etter, Blythe & Freund, *The Regulation of Consumer Credit Insurance*, 33 LAW & CONTEMP. PROB. 718 (1968); Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB.

from 40 percent to over 80 percent of the premium is retained by the lender, directly or indirectly. Profiting from the sale of credit insurance in addition to the charges permitted by the small loan laws violates the cardinal principle of a single, all-inclusive maximum rate of charge. It opens the door to manipulations and devices. Whenever anything has been sold in connection with small loans, abuses have resulted. Like vitamin pills, life and disability insurance may be good for borrowers, but licensed lenders should no more be permitted to profit from tie-in sales of insurance than from tie-in sales of vitamin pills.¹⁰⁸

The evil is further compounded in Florida where the creditor can legally require the purchase of insurance from himself.

To meet this evil many have suggested that the creditor should not be permitted to profit from the sale of this coverage.¹⁰⁹ Then the motives behind such sales would be purely those of protecting the "security," which in this instance would be the borrower's health and life. The National Consumer Act (NCA) embodies this principal with vengeance.

No creditor may receive any fee, commission, or benefit, directly or indirectly for any insurance provided for the consumer nor may any creditor provide or agree to provide any insurance for the consumer under a contract of insurance issued by the creditor or by any insurance carrier related to the creditor.¹¹⁰

The necessity and desirability of such a provision has been questioned,¹¹¹ but at the very least, the Florida Legislature should be urged to include credit life and disability insurance within the anti-coercion provisions. The next step would seem to be to enact a provision to mirror the UCCC, which includes the insurance premium within the regulated finance charge if the creditor requires such insurance.¹¹²

VI. PREPAYMENT AND REBATE RIGHTS

Where the interest or finance charge is precomputed for the entire period of the credit term, the Florida consumer who prepays before

4, 18-21 (1954).

108. Hubachek, *supra* note 107, at 19-20 (footnotes omitted).

109. See, e.g., *id.*; CONSUMER CREDIT IN THE U.S. 85-86; Shuchman, *Consumer Credit by Adhesion Contracts—II*, 35 TEMP. L.Q. 281, 301-09 (1962).

110. NCA § 4.110(1).

111. CONSUMER CREDIT IN THE U.S. 84-89.

112. UCCC §§ 2.202, 3.202. These provisions would permit the premium charge to be assessed in addition to the credit service charge (interest) "if the insurance coverage is not a factor in the approval by the seller of the extension of credit."

the end of that credit term is normally entitled to a return, refund or credit for any finance charge which is unearned at the time he satisfied the credit obligation.¹¹³

The SLA required the licensee to "[p]ermit payment of the loan in whole or in part prior to its maturity with interest on such payment to the date thereof."¹¹⁴ Since the interest under this Act was computed only on the outstanding balance and was not precomputed and added to the principal,¹¹⁵ the consumer who prepaid his obligation was required to pay, in addition to the principal amount outstanding, any interest which accrued since the last payment on the obligation. Since there was no unearned interest, there was no right to rebate of unearned interest upon prepayment.

Chapter 519, which permitted precomputation of the interest, provided upon prepayment for a refund of interest based upon the "sum of the digits" or "Rule of 78" method.¹¹⁶

113. Any discussion of prepayment includes a prepayment brought about by a renewal, refinancing or consolidation agreement.

114. FLA. STAT. § 516.15(3) (1971).

115. FLA. STAT. § 516.14(1) (1971).

116. FLA. STAT. § 519.08(1) (1971). This provision designated \$10 per \$100 per year as the maximum charge of interest. Of this, \$8 was to be considered interest and \$2 as reimbursement of expenses of making the loan. This distinction was significant because the consumer who prepaid the obligation within ninety days of the making of the contract was entitled to a refund based upon all of the initial charges (\$10 per \$100 per year) as computed under the "Rule of 78." The operation of the "sum of the digits" or "Rule of 78" method is shown in the following example. The loan consists of \$100 principal and \$20 interest, making a total of \$120 repayable in 12 months at \$10 per month.

End of Month No.	Periodic Balances after Prepayment	Periodic Balances under Original Contract
1		120
2		110
3		100
4		90
5		80
6		70
<hr/>		
	Prepayment	
7	60	60
8	50	50
9	40	40
10	30	30
11	20	20
12	10	10
TOTALS	210	780
<hr/>		
	210	
	<hr/>	
	780	

$$\frac{210}{780} \times \$20.00 = \$5.38 \text{ [amount of interest refunded].}$$

Though on first glimpse this would seem to penalize the prepaying debtor, this method achieves a remarkably close approximation of actual interest earned.

Under the CFA, the debtor is guaranteed the right of prepayment,¹¹⁷ but there is no provision specifying the method by which the rebate is to be computed. If, as some argue, the legislature intended interest to be computed on the outstanding balances, from time to time, then there is no need for rebate procedures since there was no pre-computation of the interest.¹¹⁸ But even if the interest were precomputed, it seems relatively clear that the debtor would be entitled to a full refund of unused interest. The CFA requires the licensee to "[p]ermit payment of the loan in whole or in part prior to its maturity *with interest on such payment to the date thereof.*"¹¹⁹ The method by which computation would be made would thus be irrelevant so long as the interest actually assessed and paid did not exceed that authorized by the Act.

In addition to the rebate of the finance charges, the unused portions of any credit life and disability insurance must be credited to the borrower. The method to be used is the "Rule of 78."¹²⁰

VII. DISCOUNTING INSTALLMENT SALES CONTRACTS

Not only may licensees under the CFA loan money directly to consumers, but they may also purchase retail installment contracts from merchants who sell goods on credit.¹²¹ This practice could likewise be carried on by licensees under the SLA¹²² and registrants under chapter 519.¹²³ Prior to the enactment of the CFA, a separate license under the Installment Sales Finance Act was unnecessary.¹²⁴ However, without amending the Installment Sales Finance Act, the legislature in 1973 enacted the following provision.

A licensee under the consumer finance act who purchases or holds retail installment contracts as defined in section 520.31, Florida Statutes, in Florida shall also be licensed under chapter 520 as an installment sales finance act licensee.¹²⁵

117. FLA. STAT. § 516.15(3) (1971) (unchanged by CFA). Similar provisions can be found in UCCC §§ 2.209, 3.209, and NCA § 2.209. See generally CONSUMER CREDIT IN THE U.S. 40-41.

118. See discussion relating to finance charges in section II *supra*.

119. FLA. STAT. § 516.15(3) (1971) (unchanged by CFA) (emphasis added).

120. FLA. TREAS. BULL. No. 402 (May 23, 1966).

121. FLA. STAT. §§ 520.51(1), 520.52(1) (1971); Fla. Laws 1973, ch. 73-192, § 12.

122. FLA. STAT. §§ 520.51(1), 520.52(1) (1971).

123. FLA. STAT. §§ 520.51(1), 520.52(1) (1971).

124. "No person shall engage in the business of a sales finance company in this state without a license therefor as provided in this act; provided . . . that no . . . small loan lender licensed under chapter 516, or any registrant under chapter 519, shall be required to obtain a license under this act . . ." FLA. STAT. § 520.52(1) (1971).

125. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(5)).

It is presumed that the later statutory provisions will prevail. Therefore, any company who wishes to do business under both acts should be advised to comply with both the CFA and chapter 520 licensing procedures. To avoid confusion, the legislature should mesh these provisions in the near future.

It has been suggested by one commentator¹²⁶ that the combination of sales finance companies and small loan business may be a questionable step because of possible abuses. To illustrate his point, the author cites examples where sales contracts are refinanced without the rebate of unearned interest, but with additional charges being assessed under the small loan laws. The result is that not only is interest being charged on interest, but the creditor is collecting his charges twice for the same period of time. Even though this type of "flipping" would be illegal in Florida,¹²⁷ a similar abuse could take place. Under the Retail Installment Sales Laws, a purchaser on credit is subject only to a service fee of \$10/\$100, or about 18%. If he is having trouble making his payments on time, he could be encouraged by the assignee (CFA licensee) to refinance the balance. After making the proper rebates of the unearned service charge, the assignee could now add new service charges for the new term, not at the original 18%, but rather at the small loan limits of 30%, 24% and 16%.¹²⁸

To obviate such misuse of the licensee's dual function, the percentage rate of charge which may be assessed on refinancing should be limited by the rate of charge originally contracted for. Thus, in our example on refinancing, the licensee would be required to charge no more than 18%.

VIII. CONSUMER PROTECTION

A. Scope

The next three subsections of this article deal with consumer protection provisions, which are part of the CFA but which have no counterpart either in the SLA or in chapter 519. Although these provisions will be discussed individually, they do have common scope problems. The CFA provides that its protection

shall apply to every consumer credit transaction and contract in which any form of credit is extended to an individual to purchase or

126. Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 12-13 (1954).

127. FLA. STAT. § 520.34(10) (1971).

128. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031).

obtain goods or services for use primarily for personal, family or household purposes.¹²⁹

Without more, it would seem that this provision would apply the consumer protection provisions of the body of the section to all consumer transactions, not only those within the ambit of the CFA. The original draftsmen must have had this in mind.¹³⁰ Had this been the ultimate result, Florida would have been among the leading jurisdictions that offer these protections to their citizens, but such was not the case. When the proposed act was before the Florida Senate for approval of certain House amendments, the following simple amendment which was to deprive Florida of this distinction was proposed by Senator Barron and adopted by the legislature:¹³¹

Transactions governed.—Nothing in Chapter 516 shall apply to any transaction, contract or loan other than one involving an extension of credit by a licensee as defined in Chapter 516.¹³²

Thus, legislation that surely would not have passed directly was also halted from passage via a more devious route.

To ensure that the protections of this consumer protection section are always available to debtors, the following provision was included: "Waiver by the buyer of any provisions in this section shall be void and unenforceable as contrary to public policy."¹³³

Although the scope of the section includes all consumer credit transactions, the waiver provision is limited to "buyers." This must have been a drafting oversight as the legislature could not have intended that "buyers" should have more protection than "borrowers." If the legislature should fail to remedy this obvious inconsistency, the courts should judicially rule that in the case of nonbuyers, a waiver of the protections of this section is null and void as contrary to public policy.

B. Freedom from Defenses

The doctrine of holder in due course (HIDC) was developed at a time when the vitality and free circulation of commercial paper was thought essential to an expanding commercial economy.¹³⁴ Its purpose

129. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(1)).

130. See COMM. SUB. FOR FLA. S. 835 (1973).

131. FLA. S. JOUR. 527 (1973).

132. Fla. Laws 1973, ch. 73-192, § 15 (§ 516.37).

133. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(6)).

134. See, e.g., CONSUMER CREDIT IN THE U.S. 34; Hartmann & Walker, *The Holder in*

was to give, subject to certain qualifications, the transferee or holder of a negotiable instrument more rights, or fewer defects, than held by its transferor, thus encouraging the transferability of such instruments.¹³⁵

Several prerequisites are essential to be a HIDC. First, there must be a negotiable instrument¹³⁶ and a holder.¹³⁷ The holder may then be a HIDC if he has taken the instrument for value, in good faith, and without notice that it is overdue, has been dishonored or that there is any defense against it or prior claim to it.¹³⁸ Upon obtaining such status, the HIDC takes the instrument free of personal defenses of the debtor. Personal defenses are those such as prior payment, failure or want of consideration, defects in the purchased merchandise giving rise to warranty claims, or even nondelivery of the purchased product. A HIDC, however, takes the instrument subject to real defenses such as infancy, illegality, essential fraud and discharge in bankruptcy.¹³⁹

The debtor finds that by the application of HIDC doctrine he has in most instances lost the most effective tool for obtaining satisfaction of his bargain, *i.e.*, refusing to pay unless the agreement is carried out as promised. The debtor is obligated to pay the HIDC and his only recourse is to sue the original lender or merchant payee.

The advantages of HIDC doctrine can be gained without the use of a negotiable instrument. This is achieved through the use of a contractual waiver of defense. The most common usage of such a waiver would be in a contract for the purchase of goods on credit, with payments to be made in installments. A typical provision would read: "Buyer(s) agree not to assert against any Assignee any claim or defense arising out of this sale." Although the legality of contractual waivers of defense was in question in many jurisdictions,¹⁴⁰ widespread adoption of the Uniform Commercial Code (UCC) has validated such provisions.¹⁴¹ Since the requirements and results of HIDC doctrine and

Due Course Doctrine and the Consumer, 77 COM. L.J. 116, 119 (1972); Rosenthal, *Negotiability—Who Needs It?*, 71 COLUM. L. REV. 375 (1971).

135. "It is sometimes said that the holder in due course doctrine is like oil in the wheels of commerce and that those wheels would grind to a quick halt without such lubrication." J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 457 (1972).

136. The requirements are set out in FLA. STAT. § 673.104 (1971).

137. "Holder" is defined in FLA. STAT. § 671.201(20) (1971).

138. FLA. STAT. § 673.302 (1971).

139. FLA. STAT. § 673.305 (1971).

140. FLA. STAT. ANN. § 679.206, Comment 1 (1971).

141. The UCC provides:

Subject to any statute or decision which establishes a different rule for buyers or lessees of consumer goods, an agreement by a buyer or lessee that he will not assert against an assignee any claim or defense which he may have against the seller or lessor is enforceable by an assignee who takes his assignment for value, in good

contractual waiver of defenses are so nearly the same, what follows regarding HIDC doctrine will also refer to contractual waivers of defenses, unless otherwise stated.

Over the past several years there has been a parade of articles through law journals,¹⁴² consumer publications¹⁴³ and elsewhere,¹⁴⁴ pointing out the injustices of the doctrine and the hardships that it works in the hands of unscrupulous merchants and lenders when they team up against the consumer.¹⁴⁵ Those who would limit the rights of a HIDC insist that the financial institutions that buy such consumer obligations are in the best position to police lending and selling

faith and without notice of a claim or defense, except as to defenses of a type which may be asserted against a holder in due course of a negotiable instrument under the chapter on commercial paper (chapter 673). A buyer who as part of one transaction signs both a negotiable instrument and a security agreement makes such an agreement.

FLA. STAT. § 679.206(1) (1971).

142. E.g., Hartmann & Walker, *The Holder in Due Course Doctrine and the Consumer*, 77 COM. L.J. 116, 125 (1972); Jones, *Finance Companies as Holders in Due Course of Consumer Paper*, 1958 WASH. U.L.Q. 177 (1958); Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 428-33 (1968); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 469-473 (1968); Littlefield, *Preserving Consumer Defenses: Plugging the Loophole in the New U.C.C.*, 44 N.Y.U.L. REV. 272 (1969); Rosenthal, *Negotiability: Who Needs It?*, 71 COLUM. L. REV. 375 (1971); Commentary, *Judicial and Statutory Limitations on the Rights of a "Holder in Due Course" in Consumer Transactions*, 11 B.C. IND. & COM. L. REV. 90 (1969); Comment, *Financing Consumer Goods Under the Uniform Commercial Code: Installment Buyers and Defaulting Sellers*, 37 U. CHI. L. REV. 513, 526 (1970); Note, *Consumer Financing, Negotiable Instruments and the Uniform Commercial Code: A Solution to a Judicial Dilemma*, 55 CORNELL L. REV. 611 (1970); Note, *The F.T.C. Proposed Rule and the Holder in Due Course*, 18 S.D.L. REV. 516 (1973); Comment, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-off Period*, 78 YALE L.J. 618 (1969).

143. E.g., *A Consumer Credit Code . . . For Lenders*, CONSUMER REP., March 1969, at 129; Consumer Fed'n of America, Policy Statement of Committee on Consumer Credit Practices and Policies, March 6, 1971.

144. E.g., W. MAGNUSON & J. CARPER, *THE DARK SIDE OF THE MARKET PLACE* 118-19 (1968); Miller, *Slum Swindlers Must Go*, READERS DIGEST, Nov. 1969, at 169; *Stricter Guidelines for the Money Lenders*, BUS. WEEK, Jan. 20, 1973, at 82; *The Battle Over Truth in Lending Goes On*, Nat'l Observer, Jan. 27, 1969, at 12, col. 4.

145. "In the wake of newspaper articles and consumer complaints concerning the use of negotiable installment contracts in fraudulent home improvement schemes and other consumer credit rackets, an attempt was made to bar the doctrine of holder in due course from a large proportion of consumer credit transactions during the drafting of the Uniform Commercial Code." LoPucki, *The Uniform Consumer Credit Code: Consumer's Code—Or Lender's Code?*, 22 U. FLA. L. REV. 335, 344 (1970).

The spring 1950 draft of the Uniform Commercial Code, § 9-209(3), reads: "In the case of a seller's purchase money security interest in consumer goods an agreement not to assert claims and defenses arising out of the sales contract against an assignee is not effective and a note given as part of such a transaction is subject to such claims or defenses even though in the hands of a holder in due course."

Id. at 344 n.61. This provision is not part of the recent drafts of the UCC.

practices; they are the ones who are most able to learn of the improper practices of their transferors. If one of these credit grantors does not make it a practice to satisfy its customers, then the financial institution should not purchase the paper of such transferor.¹⁴⁶

The countervailing arguments, of course, are that financial institutions should not bear the sole responsibility for consumer irresponsibility in choosing a less than reputable seller or lender. Nor would the institution be able to effectively and completely police the sellers and lenders; it would thus be made subject to the costs of assigned defects even when it had in good faith attempted to police. The result would be either to drive up the costs of consumer credit or to dry up this method of financing businesses, *i.e.*, buying up their consumer obligations. Thus consumers would find their credit opportunities more costly and/or constricted. Such changes would especially affect those consumers who cannot qualify as direct borrowers from banks or similar low interest financial institutions. Even those who would not be impressed by this display of horrors must admit that there would be a small class of persons who would abuse a non-HIDC situation by refusing to pay the financial institution because of frivolous claims, which could be quite costly in terms of attorney fees, institutional time and adverse publicity.¹⁴⁷

146. See, *e.g.*, Jordan & Warren, *The Uniform Consumer Credit Code*, 68 COLUM. L. REV. 387, 436 (1968); Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 472 (1968); Littlefield, *Preserving Consumer Defenses: Plugging the Loopholes in the New U.C.C.*, 44 N.Y.U.L. REV. 272, 280-85 (1969); *Stricter Guidelines for The Money Lenders*, BUS. WEEK, Jan. 20, 1973, at 82.

These arguments seem especially applicable for contractual waivers of defense because, unlike the promissory note, the retail installment sales contract is usually negotiated only one time; so the argument that the contract is a substitute for currency as a medium of exchange is not very effective, since the exchange occurs only once. Furthermore, conceding that the average consumer signing a promissory note realizes he must repay the money he is borrowing, can the same be said of the consumer who signs a retail installment sales contract and subsequently discovers he has not gotten what he bargained for?

147. See, *e.g.*, Separate Statement of Senator William E. Brock in CONSUMER CREDIT IN THE U.S. 231. In checking with several local bankers, it was found that these arguments are not contrived but are quite seriously presented.

These fears were apparently unfounded, however. According to the [sic] Laurence Buxbaum, Chief of the Consumer Protection Division of the Attorney General's Office: "[a]s far as we have been able to determine, the enactment of these two statutes has had no substantial negative impact upon the flow of commercial paper in Massachusetts. If anything, it has encouraged financial institutions to be more thorough in their investigations of business concerns wishing to discount paper with them. Representatives of the finance industry have encountered less difficulty than they had anticipated at the time the legislation was being considered."

. . . According to Mr. Norman Polovoy, Assistant Attorney General and Chief of the Consumer Protection Division, ". . . [o]ur experience in Maryland has shown that there is absolutely no lack of available consumer credit in our State as a result

Although courts have generally been reluctant to adopt any decision which burdens a HIDC or unduly hampers the transferability of negotiable instruments,¹⁴⁸ in recent years the courts have chipped away at the doctrine. The most significant erosion is in the situation where there is a close relationship between the original creditor and the alleged HIDC, sometimes referred to as the proximity rule¹⁴⁹ or the "close connectedness" doctrine.¹⁵⁰ In such situations, if the financing institution is in such proximity with the original creditor to evidence a lack of good faith or to indicate that the financing institution was on notice of the defects in the transaction, then the status of HIDC will be denied.¹⁵¹

In addition to the judicial response to HIDC, many states have legislated in the area. In addition to the seven states that have enacted the UCCC,¹⁵² several others have limited the doctrine to varying extents.¹⁵³

of the elimination of the holder-in-due-course doctrine in the consumer sales area." Hartmann & Walker, *The Holder in Due Course Doctrine and the Consumer*, 77 COM. L.J. 116, 123-24 (1972) (footnotes omitted).

148. See, e.g., *Baraban v. Manatee Nat'l Bank*, 212 So. 2d 341, 342 (Fla. 2d Dist. Ct. App. 1968), citing 11 AM. JUR. 2d *Bills & Notes* § 398 (1963).

149. Hartmann & Walker, *The Holder in Due Course Doctrine and the Consumer*, 77 COM. L.J. 116, 120 (1972).

150. J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE* 479-84 (1972).

151. *Id.*; Hartmann & Walker, *The Holder in Due Course Doctrine and the Consumer*, 77 COM. L.J. 116, 120 (1972). See also *Mutual Fin. Co. v. Martin*, 63 So. 2d 649 (Fla. 1953) (HIDC); *Rehurek v. Chrysler Credit Corp.*, 262 So. 2d 452 (Fla. 2d Dist. Ct. App. 1972) (contractual waiver of defenses); *Industrial Credit Co. v. Mike Bradford & Co.*, 177 So. 2d 878 (Fla. 3d Dist. Ct. App. 1965), *cert. denied*, 183 So. 2d 835 (Fla. 1966) (HIDC); *Unico v. Owen*, 232 A.2d 405 (N.J. 1967) (HIDC).

Such erosion is not, however, without its critics:

The cases are unsatisfactory from an analytical standpoint—there seems to be a piling of inference upon inference to reach a pre-determined end. They may perhaps be justified on a social engineering basis when confined to consumer transactions. Unfortunately, they have spilled over into sales by merchants to merchants, and merchants do not need an umbrella of protections which may be necessary over the heads of consumers.

Murray, *The Consumer and the Code: A Cross-Sectional View*, 23 U. MIAMI L. REV. 11, 65 (1968).

152. Colorado, Idaho, Indiana, Kansas, Oklahoma, Utah and Wyoming. The UCCC provision governing negotiable instruments and HIDC provides:

In a consumer credit sale or consumer lease, other than a sale or lease primarily for an agricultural purpose, the seller or lessor may not take a negotiable instrument other than a check as evidence of the obligation of the buyer or lessee. A holder is not in good faith if he takes a negotiable instrument with notice that it is issued in violation of this section. A holder in due course is not subject to the liabilities set forth in the provisions on the effect of violations on rights of parties [§ 5.202] and the provisions on civil actions by the Administrator [§ 6.113].

UCCC § 2.403. The UCCC gives two alternatives to govern contractual waivers of defense. Alternative A prohibits such waivers, while Alternative B sets forth a complicated scheme

whereby certain defenses can be cut off after notice of assignment and a three-month waiting period. UCCC § 2.404.

153. The states that have statutory limitation on the HIDC doctrine have approached the task in different ways. Massachusetts requires any promissory note executed in connection with retail sales of consumer goods to have printed on its face "consumer note." MASS. GEN. LAWS ANN. ch. 255, § 12C (Supp. 1972). This section has been construed to make the holder of such note subject to all defenses which could be interposed against the original payee. *Alcoa Credit Co. v. Nickerson*, 43 Mass. App. Dec. 1 (1968). Furthermore, Massachusetts specifies certain relationships between sellers and lenders which deny HIDC status to lenders.

A creditor in consumer loan transactions shall be subject to all of the defenses of the borrower arising from the consumer sale or lease for which the proceeds of the loan are used, if the creditor knowingly participated in or was directly connected with the consumer sale or lease transaction.

Without limiting the scope of the preceding paragraph, a creditor shall be deemed to have knowingly participated in or to have been directly connected with a consumer sale or lease transaction if: (a) he was a person related to the seller or lessor; (b) the seller or lessor prepared documents used in connection with the loan; (c) the creditor supplied forms to the seller or lessor which were used by the consumer in obtaining the loan; (d) the creditor was specifically recommended by the seller or lessor to the borrower and made two or more loans in any calendar year, the proceeds of which are used in transactions with the same seller or lessor, or with a person related to the same seller or lessor; or (e) the creditor was the issuer of a credit card which may be used by the consumer in the sale or lease transaction as a result of a prior agreement between the issuer and the seller or lessor.

MASS. GEN. LAWS ANN. ch. 255, § 12F (Supp. 1972).

Rhode Island requires the term "non-negotiable consumer note" to be on all consumer notes and basically follows the Massachusetts provisions. R.I. GEN. LAWS ANN. § 6-27-5 (Supp. 1972).

Hawaii provides that:

(b) No contract shall contain any provision by which a buyer agrees not to assert against a seller a claim or defense arising out of the sale or agrees not to assert against an assignee such a claim or defense other than as provided in subsection (d).

....

(d) No rights of action or defense arising out of a retail installment sale which the buyer has against the seller shall be cut off by assignment, and in the event the buyer has a good cause of action or defense against the seller the seller's assignee has recourse against the seller for any losses he, the assignee, may incur as a result thereof.

HAWAII REV. STAT. § 476-18 (1968).

Maryland requires any note taken in an installment transaction to make reference to the agreement and subjects any subsequent holder of the note to all defenses or claims that the debtor may have against the seller. MD. ANN. CODE art. 83, § 147 (1969).

Washington requires recitation in all retail installment notes that no third party rights of action or defenses are cut off by negotiation or assignment. WASH. REV. CODE ANN. § 63.14.020 (Supp. 1972).

Illinois provides that no rights of action or defenses are cut off by negotiation of negotiable instruments issued in installment agreements unless there is in the agreement a notice provision giving the debtor five days in which to notify the assignee of any claims the debtor has against the seller. ILL. ANN. STAT. ch. 121 1/2, § 262D (Smith-Hurd Supp. 1973).

Delaware basically follows the pattern of Illinois but allows fifteen days for notification. DEL. CODE ANN. tit. 6, § 4312 (Supp. 1970).

In Florida, until the passage of the CFA, the only legislative limitation on the use of negotiable instruments and the resulting HIDC doctrine was found in the Home Improvement Sales and Finance Act.

Every promissory note or mortgage shall bear on the side of the note or mortgage which contains the maker's signature the following legend in at least ten point boldface type: "Payment of this note or mortgage is subject to the terms of a home improvement installment contract of even date between maker and payee or mortgagor and mortgagee." The contract may require execution of a promissory note or mortgage.¹⁵⁴

The key words of this statement, "subject to the terms of a home improvement installment contract," render the note nonnegotiable,¹⁵⁵ thus negating the HIDC doctrine. The Home Improvement Sales and Finance Act also prohibits any agreement in a home improvement sales contract by which the buyer agrees not to assert a claim or defense against the seller's assignee.¹⁵⁶ Thus contractual waivers of defenses, as well as HIDC status, are unavailable to transferees of home improvement sales contracts.

The CFA makes a frontal attack on the HIDC doctrine by providing that

[a] holder or assignee of any negotiable instrument or installment contract, other than a currently dated check, which originated from

Connecticut requires all home solicitation sales notes to include notification that the note is not negotiable and thereby makes assignees of the note subject to the debtor's claims and defenses. The pleading and proof of such a recitation is a prerequisite to enforcement of the note by the seller or assignee. But the negotiation of a note not containing such a provision does not hinder subsequent HIDC rights and defenses. CONN. GEN. STAT. ANN. § 42-136 (Supp. 1973).

Oregon provides that no retail installment contract can require the making of a negotiable note. The violation of this prohibition does not hinder subsequent HIDC status but does subject the seller to claims by the debtor for loss and expenses incurred in defending an action on the instrument. ORE. REV. STAT. § 83-650 (1971).

Vermont simply makes the holder of a promissory note or other evidence of consumer indebtedness subject to all defenses that are available to the consumer in an action on a simple contract. VT. STAT. ANN. tit. 9, § 2455 (1971).

California prohibits execution of any note by the buyer which cuts off third party rights or claims. CAL. CIV. CODE § 1810.7 (West 1973).

New York makes an assignee of a retail installment contract subject to all claims and defenses of the buyer notwithstanding an agreement to the contrary, up to the amount of the remaining balance of the contract. N.Y. PERSONAL PROPERTY LAWS § 403(6) (McKinney Supp. 1972).

154. FLA. STAT. § 520.80 (1971).

155. FLA. STAT. §§ 673.104, 673.105 (1971).

156. FLA. STAT. § 520.74(1) (1971).

the purchase of certain consumer goods or services, is subject to all claims and defenses of the consumer debtor against the seller of those consumer goods or services. A person's liability under this section may not exceed the amount owing to the person when the claim or defense is asserted against the person.¹⁵⁷

The scope of this provision may be quite limited. In addition to the limitations discussed above,¹⁵⁸ the section seemingly applies only to CFA licensees who are both licensed under chapter 520 and are purchasing retail installment contracts.¹⁵⁹ If the statutory language, "which originated from the purchase of certain consumer goods or services," could be interpreted to include consumer loans, the statute's coverage would be considerably broadened. It is quite doubtful that any court would include "consumer loan" within the definition of "consumer goods," but to the extent that licensees make loans available to consumers who are desirous of credit and unable to borrow at the lower bank rates, they are performing a "service." It may be stretching the point, however, to suggest that the obtaining of such a loan is a "purchase of . . . services," instead of a mere *utilization* of the service.

Another construction may also be available to broaden the coverage. If "which originated from" is taken to include all the circumstances which occasioned the loan, then most uses of HIDC by a licensee would be outlawed; *e.g.*, *O* has an operation on his big toe, and to pay the doctor he goes to LO Finance which gives him a loan; *O* signs a promissory note and LO transfers the note to HI Finance; the need for the loan "originated from the purchase of certain consumer goods or services." Then the only loan that would not be included within the terminology would be where the consumer-borrower has no particular purchase in mind but merely wants additional liquidity.

The exemption of "a currently dated check" is one of common sense, as checks are commonly considered to be akin to currency and thus should be freely transferable. This exception will not be widely used, as it is difficult to think of a factual situation where a licensee could become a subsequent holder of such a check as to be entitled to HIDC rights. The limitation that the check must be "currently dated" is to avoid possible abuses of the check exception. Without such qualification, the creditor on a thirty-six month repayment contract could have taken thirty-six checks, one dated for each month of the contract.¹⁶⁰

157. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(2)).

158. See section VIII(A) *supra*.

159. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(2), (5)); FLA. STAT. §§ 520.31(7), 520.51(2), 520.52 (1971).

160. "A postdated check is nonetheless a check because postdated." 11 AM. JUR. 2d

A significant loophole that is still available under the CFA is explained by New York's Governor Rockefeller.

Last year, the Legislature eliminated the "holder-in-due-course" doctrine in most consumer credit transactions by prohibiting the use of waiver of defense clauses in retail installment sales contracts.

Since then, however, a number of unscrupulous merchants and finance companies, particularly in poverty areas, have managed to get around the intent of the 1970 law through the use of the so-called "specious cash sale."

The way this scheme works is that the unwary consumer who desires to make an installment purchase is sent or even taken by the merchant to a finance company, which will lend the consumer the amount he needs for his intended purchase. The consumer then returns to the merchant and makes a "cash" purchase. The 1970 law did not apply to such "cash" transactions. Consequently, the consumer who is stuck with defective or misrepresented goods must continue to pay back the loan from the finance company.¹⁶¹

Other states besides New York have legislated with a view to this problem.¹⁶² The NCA¹⁶³ and a recent redraft of the UCCC¹⁶⁴ also provide protection to the consumer in this area.

By limiting the section's coverage to negotiable instruments and installment contracts, the legislature ignored the possibility of use of nonnegotiable notes with a contractual waiver of defense clause.¹⁶⁵ This defect would be crucial only in the realm of loans because most other transactions would be within the definition of "installment contract."¹⁶⁶

The HIDC prohibition, though perhaps limited in scope, considerably increases the debtor's rights vis-a-vis the subsequent assignee. In most situations the debtor is not only entitled to use all his defenses when pressed for payment, but he is also authorized to make claims against the subsequent assignee for defects in the "certain consumer goods or services." This right to make a positive claim against the assignee, though at odds with the proposed UCCC,¹⁶⁷ solidifies the posi-

Bills & Notes § 19 (1963). See also FLA. STAT. § 673.114 (1971).

161. 2 MCKINNEY'S 1971 SESSION LAWS OF N.Y. 2622-23 (1971). The remedial statute is N.Y. GEN. BUS. LAW § 253 (McKinney Supp. 1972).

162. E.g., MASS. GEN. LAWS ANN. ch. 255, § 12F (Supp. 1972); WIS. STAT. ANN. § 422.408 (Spec. Pamphlet 1973).

163. NCA § 2.407.

164. UCCC § 3.405 (Working Redraft No. 4, Dec. 1972).

165. For a discussion of nonnegotiable instruments see 11 AM. JUR. 2d *Bills & Notes* § 7 (1963).

166. FLA. STAT. §§ 520.31(7), 520.51(2) (1971).

167. "Rights of the buyer or lessee under this section can only be asserted as a matter

tion of UCC article 9, which provides: "[T]he rights of an assignee are subject to . . . all the terms of the contract between the account debtor and assignor and any defense or claim arising therefrom"¹⁶⁸

The strength of the CFA "claim and defenses" provision is somewhat offset by the limitation at the end of the section. "A person's liability under this section may not exceed the amount owing to the person when the claim or defense is asserted against the person."¹⁶⁹ Such a qualification limits the attractiveness of the assignee as a defendant in warranty or other cases where a significant portion of the obligation has already been paid. More consumer-prone provisions have been suggested both in the Report of the National Commission on Consumer Finance¹⁷⁰ and the NCA.¹⁷¹

Even with the discussed limitations, this section of the CFA will surely encourage affected purchasers of consumer obligations to police their transferors. The possibility of being subjected to a warranty claim, for instance, should be enough to prod any buyer of consumer paper to understand and regulate the practices of the seller of such paper—his other alternatives of course are going out of the business of buying consumer paper or opening an adjunct fix-it shop.¹⁷²

C. Deficiency Judgments

There are no provisions in either the SLA or chapter 516 that specifically provide for or deal with the topic of deficiency judgments.¹⁷³ Florida's version of the UCC, however, has two pertinent statutes which deal with the subject.

Section 679.504(1) states that "[a] secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing." The statute further provides that the proceeds are to be applied to the expenses in the following order: first, the expenses of preparation for resale, expenses of repossession, attorney's fees and other such reasonable fees; second, the satisfaction of the indebtedness;

of defense" UCCC § 2.404, Alternative A. See also *id.* at § 2.404(3), Alternative B. *Contra*, NCA § 2.406 ("subject to all claims and defenses"); CONSUMER CREDIT IN THE U.S. 35 ("subject to all claims and defenses").

168. FLA. STAT. § 679.318(1)(a) (1971).

169. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(2)).

170. CONSUMER CREDIT IN THE U.S. 35 ("liability should not exceed the original amount financed").

171. NCA § 2.406 ("amount of transaction total").

172. A provision which was part of the SLA and which was not repealed by the CFA permits other businesses to be conducted in the same office. FLA. STAT. § 516.09(3) (1971).

173. Nor does the Retail Installment Sales Act (FLA. STAT. ch. 520 (1971)) contain any such regulatory provisions.

third, the satisfaction of any lesser secured interests if notice is given and demand is properly made upon the first creditor.¹⁷⁴ Subsection (2) basically states that the creditor must account to the debtor for any surplus and unless otherwise agreed the debtor is liable for any deficiency.¹⁷⁵

These provisions present two problems for the consumer. First, in most instances there will be a deficiency rather than a surplus because of the deflated price realized at a forced sale and the incident costs as suggested by section 679.504(1). This result has prompted Professor Gilmore, the chief draftsman of this portion of the UCC, to make the following comment.¹⁷⁶

Sad experience has taught us that a power of sale coupled with a right to a deficiency judgment, can be harder on the debtor than strict foreclosure ever was. The surplus to be returned to the debtor after the sale is a glittering mirage; the deficiency judgment is the grim reality. Furthermore the person who buys at the sale today, nine times out of ten, is not our hero, the good faith purchaser for value, but the holder of the security interest who pays not in cash but by a credit against the debt.

Second, quite seldom will the debtor have the economic power to force the creditor to agree to limit his rights as regards the deficiency.

Section 679.505(1) requires that if the debtor has paid off at least 60% of the loan, has not signed a default statement renouncing his rights and the creditor has taken possession of the collateral, the creditor must dispose of the collateral within ninety days. Failure to comply with this provision would subject the creditor to an action in conversion or an action under section 679.507 which permits the consumer-debtor to recover at least the credit service charge plus 10% of the principal amount of the debt.¹⁷⁷ Subsection (2) provides that in any case not covered by subsection (1), the creditor may retain the goods in satisfaction of the obligation if the debtor or any other secured party does not make timely objection.¹⁷⁸

This statute, though appearing to be designed for his benefit, does little for the consumer. It would seem to protect him only in two types of situations. First, where a large percentage of the indebtedness has been paid off, the creditor must sell the collateral. This is beneficial to

174. FLA. STAT. § 679.504(1) (1971).

175. FLA. STAT. § 679.504(2) (1971). Identical language is found in FLA. STAT. § 679.-502(2) (1971).

176. 2 G. GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 1188-89 (1965).

177. FLA. STAT. § 679.505(1) (1971).

178. FLA. STAT. § 679.505(2) (1971).

the debtor only if we assume that the sale will produce a surplus over the remaining indebtedness. Second, in the cases where the creditor is authorized to retain the collateral in satisfaction of the obligation, the debtor will probably profit because of the savings on the costs incident to forced sale and because he will avoid a possible deficiency judgment.

In one of its more important provisions, the CFA restricts deficiency judgments as follows:

If a creditor takes possession of property which was collateral under a consumer credit transaction, the consumer shall not be personally liable to the creditor for any unpaid balance of the obligation unless the unpaid balance of the consumer's obligation at the time of default was \$2000 or more [*sic*] the creditor shall be entitled to recover from the consumer the deficiency, if any, resulting from deducting the fair market value of the collateral from the unpaid balance due. In a proceeding for a deficiency the fair market value of the collateral shall be a question for the trier of fact. Periodically published trade estimates of the retail value of goods shall, to the extent they are recognized in the particular trade or business, be presumed to be the fair market value of the collateral.¹⁷⁹

To justify a nearly identical provision, the draftsmen of the NCA point out:

The major concern of a legitimate creditor is with respect to the rare consumer who defaults on one of the early payments leaving used collateral and a rather substantial unpaid balance. It is felt that this concern is legitimate and should be accommodated, but only to the extent that a significant transaction is involved.¹⁸⁰

179. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(3)). The National Commission on Consumer Finance in a similar provision exempts from deficiency judgments those transactions where the *sales price* or *loan* (not "balance") was \$1,765 or less. The reason the figure of \$1,765 was chosen is because it was found that most used cars would be below that figure and most new cars would be above it. Likewise, a \$1,765 limit would provide protection to the consumer-debtor in most of his credit purchases of furniture and appliances. CONSUMER CREDIT IN THE U.S. 29-30. UCCC § 5.103 also utilizes the *sales price* (\$1,000) rather than the *balance*.

180. NCA § 5.211, Comment 1; cf. UCCC § 5.103, which limits deficiency judgments in two instances, both of which involve the sale of goods and/or services but not loans. First, "[i]n cases of sales of \$1000 or less, this section gives to the seller the option of either suing for the unpaid balance or repossessing, but he may not do both." *Id.* at Comment 3. The second instance involves a situation where the seller has taken a security interest in collateral other than goods sold in the consumer credit sale. "In these cases, if the cash price of the sale is \$1000 or less, the seller who repossesses or voluntarily accepts surrender of collateral may not obtain a deficiency judgment against the buyer" *Id.* at Comment 4.

The CFA provision apparently eliminates the possibility of deficiency judgments in most sales and loans within its purview. The maximum credit that may be extended by a licensee and still obtain the more favorable interest rates is \$2500, and the maximum term is thirty-six months, fifteen days.¹⁸¹ If the debtor faithfully makes ten monthly payments, he will have an outstanding principal balance of less than \$2,000 and thus not be subjected to a deficiency judgment. It may be argued that after ten months there will be more than \$2,000 owing if the obligation is viewed as including the principal plus interest for the remainder of the term. Such an argument should be disregarded, however, because at any time the debtor is entitled to prepay without penalty¹⁸² and after ten payments the prepayment sum would be less than \$2,000.

There is one additional problem under this provision, however, which may considerably weaken its consumer protection aspect. There appears to be nothing to stop the creditor from getting a judgment against the debtor for the "less than \$2,000 balance" and then levying execution on the debtor's property. Except for the application of the homestead exemption,¹⁸³ the net result of this action would seem to be identical from the debtor's standpoint. The only advantages would seem to flow to other creditors who may have had second priorities as to the secured collateral but would be prior to a judgment lien.¹⁸⁴ This situation may be remedied in two ways: first, the court presented with such a situation could rule that to permit such a result clearly violates the intent of the provision, since the legislature surely would not intend to give the consumer-debtor a hollow right. Secondly, the legislature could enact legislation to provide that if a creditor is not entitled to a deficiency judgment, he will not be permitted to achieve substantially the same result by first obtaining a judgment and then levying execution against the property.¹⁸⁵

Even in those instances in which the balance is above the \$2,000 cutoff point, the consumer-debtor is going to profit from the provisions of the CFA. In such situations the creditor is to compute the deficiency by taking the unpaid balance and subtracting from it the fair market value of the collateral. This value is to be determined by the trier of fact (the jury in the case of a jury trial and otherwise by the judge). Periodic trade estimates of the retail value of goods would be presumed to be the fair market value. Fair market value is used because, as men-

181. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031).

182. FLA. STAT. § 516.15(3) (1971).

183. FLA. CONST. art. 10, § 4.

184. See, e.g., FLA. STAT. §§ 679.301(1)(b), 679.312(5) (1971).

185. Cf. UCCC § 5.103(6).

tioned previously, a forced sale of consumer goods will usually not realize the value of the collateral, especially if the sale is made to merchants or employees as is often the case with repossessed merchandise. Therefore "blue books" and other trade publications or other evidence of fair market value are felt to be more equitable to the debtor and will protect his rights more efficiently. Though this may appear to be a cumbersome procedure, it should prevent many of the obvious overcharges and much of the undervaluation inherent in forced sales.

D. Limitations on Collateral

Prior to the enactment of the CFA, there were few Florida provisions regulating collateral besides Florida's version of the UCC, which for the most part merely set up procedures by which the security holder could gain priority over other creditors and established procedures which must be followed upon default and repossession.¹⁸⁶ The one relevant provision in the SLA was in the same section as wage assignments and was eliminated in the amending process:

[N]or shall any assignment or order, or any chattel mortgage or other lien on household furniture then in the possession and use of the borrower be valid unless it be in writing signed in person by the borrower; or, if the borrower is married, unless it be signed in person by both husband and wife¹⁸⁷

Restrictions on household goods as collateral have been strongly recommended,¹⁸⁸ and Florida should provide such protection. The National Commission on Consumer Finance flatly recommends that "[a] creditor should not be allowed to take other than a purchase money security interest in household goods."¹⁸⁹ This provision would seem to be a reasonable one because it would not discourage the purchase of goods on credit but would eliminate much of the disruption of family life which occurs when repossession of household goods is threatened.

One of the greatest abuses of using collateral as security for an

186. FLA. STAT. §§ 679.101-.507 (1971).

187. FLA. STAT. § 516.17 (1971); Fla. Laws 1973, ch. 73-192, § 8 (§ 516.17).

188. *E.g.*, CONSUMER CREDIT IN THE U.S. 27; NCA § 2.416.

189. CONSUMER CREDIT IN THE U.S. 27; *accord*, NCA § 2.416(2).

A security interest is a "purchase money security interest" to the extent that it is: (1) taken or retained by the seller of the collateral to secure all or part of its price; or (2) taken by a person who by making advances or incurring an obligation gives value to enable the debtor to acquire rights in or the use of collateral if such value is in fact so used.

FLA. STAT. § 679.107 (1971).

obligation is what is referred to as cross collateral. The use of cross collateral is illustrated by the following example. Consumer goes into Acme Furniture to purchase a living room suite on credit. He signs the financing forms as provided by Acme. He faithfully makes his monthly payments until 75% of the obligation is satisfied. Consumer then returns to Acme Furniture to purchase a kitchen stove on credit. Again he signs the financing forms and again he makes his payments regularly and faithfully until it is nearly paid off. Then Consumer decides he wants to buy a huge stereo outfit from Acme, which he does, and again he signs the forms. Each time he purchases something from Acme on credit, the agreement contains the following provision:

The amount of each periodical installment payment to be made by ___ to Acme Furniture under this agreement shall be inclusive of and not in addition to the amount of each installment payment to be made by ___ under such prior agreements; and all payments now and hereafter made by ___ shall be credited pro rata on all outstanding agreements between Acme Furniture and ___ until the time each such payment is made.

The effect of this provision is to keep a balance due on all items purchased from this seller until they are all paid off. The injustice enters when Consumer defaults on the payments on the agreement made for the purchase of the stereo; he in fact is in default on all of the chain of purchases he made from this seller. Thus Acme will repossess not only the stereo, but also the kitchen stove and the living room suite. Although this is only one of the forms that cross collateral can take, it exemplifies the problem.¹⁹⁰

To remedy this situation, the CFA includes the following provision:

If debts arising from two (2) or more retail installment sales or other credit contracts with individual consumers are secured by more than one (1) security interest or consolidated into one (1) debt payable on a single schedule of payments and the debt is secured by security interests taken with respect to one (1) or more of the sales, payments received by the seller are deemed, for the purpose of determining the amount of the debt secured by the various security instruments, to have been first applied to the payment of the debt arising from the sale first made. To the extent debts are paid according to this section, security interests in items of property terminate as the debt originally incurred with respect to each item is paid. Payments received by the

190. Even though the example is of a seller of merchandise, the same chain of events could occur if the creditor was making a series of advances and taking new collateral for each advance.

seller or holder upon a revolving account are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of finance charges in the order of their entry to the account and then to the payment of debts in the order in which the entries to the account showing the debts were made. If the debts consolidated arose from two (2) or more credit sales or other credit contracts with an individual which were made on the same day, payments received by the seller or holder are deemed, for the purpose of determining the amount of the debt secured by the various security interests, to have been applied first to the payment of the smallest debt.¹⁹¹

Although this provision does not prohibit cross collateral arrangements, it eliminates their inherent evil by requiring all payments to be applied first to the earlier obligations, according to their relative dates of creation. The security interest in the collateral terminates on a first-in, first-out basis as each item is paid off. If the transactions involved are made on the same day, then the payments are applied first to the smallest debt.

There are, however, problems with the interpretation of this section. The most important is its scope. Although there is little question that it is limited to transactions with licensees,¹⁹² there appears to be some confusion as to whether it was intended to apply to both consumer sales and loans. Although the section begins by referring to "retail installment sales or other credit contracts," which would be broad enough to include loans, the body of the section refers only to "sales," "sellers," and "seller or holder." The only one of these terms which could clearly include loans is "holder."¹⁹³ The last sentence of the section again uses the language "credit sales or other credit contracts." To resolve the confusion, this section should be read in light of the stated scope: "This section shall apply to every consumer credit transaction and contract in which any form of credit is extended to an individual to purchase or obtain goods or services for use primarily for personal, family or household purposes."¹⁹⁴ When so read, it seems clear that the intended application of this section includes not only consumer sales transactions but consumer loans as well, except for those rare situations where the money is being borrowed for reasons other than "to purchase or obtain goods or services."

191. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(4)). A similar provision was made part of the Retail Installment Sales Act. Fla. Laws 1973, ch. 73-34. The provisions seem to be modeled after UCCC § 2.409. See also CONSUMER CREDIT IN THE U.S. 26-27.

192. See section VIII(A) *supra*.

193. "Holder" is defined in FLA. STAT. § 671.201(20) (1971).

194. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.31(1)).

Another problem, although not serious, relates to the language dealing with "revolving accounts." Since the section is limited in its application to licensees who are to be making loans or buying retail installment contracts, and since the definition of "retail installment contract" does not include "revolving accounts,"¹⁹⁵ the revolving account provision seems to be misplaced.

One additional provision of the CFA also regulates the taking of collateral: "A licensee may not take a security interest secured by land on any loan less than one thousand dollars (\$1,000.00)."¹⁹⁶ This provision seems to be quite reasonable—the very possibility of a debtor losing his home because of an insignificant sum being borrowed against it is shocking. The drafters of the NCA have gone even further by extending the exclusion to \$3,000.¹⁹⁷ The \$1,000 limitation should have little effect on the licensees, however, because real estate mortgages are seldom taken in conjunction with small loans.¹⁹⁸

Certain limitations on collateral are desirable. Quite often a greedy creditor will tie up all of the debtor's property for a very small obligation. This has the practical effect of freezing the debtor's credit, at worst, or restricting his business to the creditor who holds the security interest. To remedy such situations restrictions should be placed on the value of the collateral vis-a-vis the loan principal.¹⁹⁹

IX. OTHER LIMITATIONS ON CREDITORS' PRACTICES AND CONTRACTUAL PROVISIONS

A. Confessions of Judgment

The confession of judgment provision, sometimes referred to as a "cognovit note,"²⁰⁰ permits the creditor, on default, to obtain a judgment against the debtor without either notice or opportunity to appear. Normally, in such a situation, the first notice that the debtor receives is when the creditor is seeking to enforce the judgment by levy of execution or garnishment. The debtor placed himself in this position by signing a warrant of attorney which authorized another to receive

195. "Retail installment contract" is defined in FLA. STAT. §§ 520.31(7), .51(2) (1971).

196. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(1)); accord, UCCC § 2.407(1).

197. NCA § 2.416(3)(a).

198. The Discount Consumer Financing and Small Loan Annual Reports do not even include real estate in the itemized "Analysis of Loans by Types of Security." ANNUAL REPORTS 11-12.

199. See, e.g., NCA § 2.416(3)(b).

200. A confession of judgment provision is a broad term encompassing arrangements where the debtor executes a warrant of attorney. The term "judgment (or cognovit) note" is more correctly applied to negotiable notes containing confession clauses.

notice and to confess judgment. A due process violation is technically avoided because the confessing attorney is the agent of the debtor.

Confessions of judgment have been prohibited by many states²⁰¹ and the National Commission on Consumer Finance has stated:

No consumer credit note or contract should be permitted to contain a provision whereby the debtor authorizes any person by warrant of attorney or otherwise, to confess judgment on a claim arising out of the consumer credit transaction without adequate prior notice to the debtor and without an opportunity for the debtor to enter a defense.²⁰²

Florida likewise generally prohibits confessions of judgment.²⁰³ Both the SLA and the CFA contain specific prohibitions against confessions of judgment: "No licensee shall take any confession of judgment or any power of attorney."²⁰⁴ The invalid confessions are severable and the provision does not invalidate an otherwise valid loan, but merely renders the provision containing such power invalid.²⁰⁵

The Florida courts have held, however, that a judgment that is taken pursuant to a confession, which if valid in the jurisdiction where rendered, will be enforceable in Florida.²⁰⁶ But even this limited recognition of confessions of judgment may be subject to further qualification.

A recent United States Supreme Court decision, *Swarb v. Lennox*,²⁰⁷ has declared the Pennsylvania practice of taking judgments by confession unconstitutional, not on its face, but as it applies to consumers with income less than \$10,000 annually. The Court affirmed the decision of a three-judge federal district court in its holding that all entries of confessed judgments against members of this class were prospectively enjoined unless it is shown that the consumer had intentionally, understandingly and voluntarily waived his rights to pre-judgment hearing and notice. The Supreme Court did recognize that

201. For a compilation of circumstances in which confessions of judgment and cognovit notes are prohibited see 1 CCH CONSUMER CREDIT GUIDE ¶ 610 (1972). The UCCC and the NCA both prohibit confessions of judgment. See UCCC §§ 2.415, 3.407; NCA § 2.404(1).

202. CONSUMER CREDIT IN THE U.S. 26.

203. FLA. STAT. § 55.05 (1971).

204. FLA. STAT. § 516.16 (1971) (unchanged by CFA).

205. *Mason v. City Fin. Co.*, 151 So. 521 (Fla. 1933).

206. See, e.g., *Carroll v. Gore*, 143 So. 633 (Fla. 1932); *Pearson v. Friedman*, 112 So. 2d 894 (Fla. 3d Dist. Ct. App. 1959).

207. 405 U.S. 191 (1972).

under appropriate circumstances a debtor may be held to have waived his rights by signing a cognovit note.²⁰⁸

B. Assignment of Wages

Generally speaking, an employee may assign unpaid wages already earned, or future earnings where the employee is under an actual contract of employment, except in the case of public officers That the state, in the exercise of its police power, may regulate, limit, or prohibit assignments of wages to be earned is generally recognized.²⁰⁹

The problem of assignment of wages in relation to a consumer loan was thought to be a special problem and thus merited special legislation. The SLA²¹⁰ and chapter 519²¹¹ contained identical provisions, which specifically required that the loan be paid to the borrower simultaneously with the execution of the assignment, that the assignment be in writing and, if the borrower is married, that the spouse's signature be included, unless he has been separated for at least five months. The CFA, on the other hand, makes a blanket prohibition of wage assignments.²¹²

In spite of outward appearance, this change really did little to improve the consumer's position vis-a-vis the small loan lender. Not only had the attorney general ruled that wage assignments by government employees were invalid and not binding on government employers,²¹³ but he had also ruled that any notice to an employer of a wage assignment was improper and contrary to law and "moreover, resort to such a device . . . may well be violative of Section 516.29, Florida Statutes, 1957, which provides for the suspension or revocation of license for the use of unreasonable collection tactics."²¹⁴ In later cor-

208. Such a situation occurred in *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174 (1972), which was handed down the same day as *Swarb*. In *Overmeyer*, which involved a commercial situation where a corporate debtor knowingly signed an installment note containing a cognovit clause, the court upheld the validity of such a provision on the basis of the factual circumstances. A previous lower court decision which had denied enforcement of such clauses upon the basis of a fourteenth amendment due process violation, has been vacated by the Supreme Court for further consideration in light of the *Swarb* decision. *Osmond v. Spence*, 327 F. Supp. 1349 (D. Del. 1971), *vacated*, 405 U.S. 971 (1972).

209. 3 FLA. JUR. *Assignments* § 8 (1955).

210. FLA. STAT. § 516.17 (1971).

211. FLA. STAT. § 519.11 (1971).

212. FLA. LAWS 1973, ch. 73-192, § 8; *accord*, NCA § 2.403(1); UCCC §§ 2.410, 3.403. The UCCC, however, does not prohibit the use of wage deductions, if the debtor can revoke his authorization.

213. [1959-1960] FLA. ATT'Y GEN. BIENNIAL REP. 224; *see* [1953-1954] FLA. ATT'Y GEN. BIENNIAL REP. 125; [1951-1952] FLA. ATT'Y GEN. BIENNIAL REP. 599.

214. Letter from Atty. Gen. Richard Ervin to Lewis Tribble, General Counsel to the

respondence, the general counsel to the comptroller advised that all small loan companies and consumer finance companies should be notified "that such an assignment gives them only a lien which can be enforced by proper court action."²¹⁵ In fact, in 1971, of the thirty-seven wage assignments taken by the lenders operating under chapter 519, only one was brought to court action and thus enforced.²¹⁶

Though the provisions and interpretations which limit or even eliminate wage assignments purport to recognize "the potential for hardship for a consumer and his dependents which may result from a disruption of the steady flow of family income,"²¹⁷ to totally eliminate this form of collateral may be more to the debtor's detriment. Many debtors have no collateral other than their wages to offer as security for a loan.²¹⁸ The National Commission on Consumer Finance has proposed what seems to be a workable compromise.²¹⁹

In consumer credit transactions involving an amount financed exceeding \$300, a creditor should not be permitted to take from the debtor any assignment, order for payment, or deduction of any salary, wages, commissions, or other compensation for services or any part thereof earned or to be earned. In consumer credit transactions involving an amount financed of \$300 or less, where the creditor does not take a security interest in any property of the debtor, the

Comptroller, Nov. 3, 1959. Attorney General Ervin based his opinion on the following reasoning. Prior to the 1953 legislative session,

[s]ection 516.17, Florida Statutes, contained a provision permitting the service upon employers of licensees' debtors a notice of wage assignment, together with certain directions to said employers for the partial withholding and remittance of the debtor's wages for the benefit of the licensee.

It has been held that when the legislature initially included the provision for notice and service upon employers of wage assignments, it had thereby created an additional remedy in favor of small loan companies for the collection of a debt. *Parliament Loan Corporation v. Coward Brothers*, 7 Fla. Supp. 14. The wage assignment being but a means of enforcing payment of a debt and this being a remedy given by law and not of the essence of the loan contract, it was entirely within the control of the law-making power by whose authority it was given life to abolish the remedy.

Id.

215. Letter from Lewis Tribble, General Counsel to the Comptroller, to Roy Caruthers, Director of the Small Loan Department, Nov. 4, 1959.

216. ANNUAL REPORTS 11-12. In the portion of the report dealing with the SLA there are no separate statistics for wage assignments.

217. UCCC § 2.410, Comment.

218. "In fact, 99 percent of the loans that the Municipal Credit Union makes are based upon the wage assignment with no co-makers, no security . . ." *Hearings on H.R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess., pt. 2, at 1204 (1967), as cited in H. KRIPKE, *CONSUMER CREDIT: TEXT-CASES-MATERIALS* 171 (1970); accord, *CONSUMER CREDIT IN THE U.S.* 31.

219. *CONSUMER CREDIT IN THE U.S.* 31.

creditor should be permitted to take a wage assignment but in an amount not to exceed the lesser of 25 percent of the debtor's disposable earnings for any workweek or the amount by which his disposable earnings for the workweek exceeds 40 times the Federal minimum hourly wage prescribed by section 6(a)(1) of the Fair Labor Standards Act of 1938 in effect at the time.

The Commission goes on to recommend additional protection for the debtor by suggesting that if, because of default, the assignment becomes operative, the debtor should have the right to ask an appropriate court to have the assignment stayed if it would cause the debtor hardship because of an unexpected emergency such as an illness in the family.²²⁰

C. Balloon Payments

A balloon payment is a provision in an installment loan or other closed-end credit transaction which provides for a payment substantially in excess of the average monthly payment. This device is often utilized in credit sales or loans to persons with seasonal or otherwise irregular sources of income. Balloon payments are, however, subject to abuse where, for no particular reason, a consumer enters into such an installment agreement.

There are two problem areas. First, unless the consumer is aware of the balloon payment, the monthly payment he agrees upon is going to be deceptively low. Second, if the consumer is unable to make the balloon payment at the end of the term, he may find that he must refinance the final balloon payment at a rate exceeding the original contract interest rate, or he may be forced to default on his obligation, which would entitle the creditor to enforce his security interest.²²¹

The SLA made no specific reference to whether balloon payments were permitted to be included in the loan contract. Chapter 519, however, required the loan to be repayable in "substantially equal monthly or other periodic installments," which would seem to eliminate balloon payments.²²²

220. *Id.* at 32. See also Uniform Small Loan Law § 17 (Rev. Draft No. 7, June 1942), quoted in B. CURRAN, TRENDS IN CONSUMER CREDIT LEGISLATION 144, 155-56 (1965) (wage assignments limited to "a sum not to exceed 10 percent of the borrower's salary"). Also, the principal amount that can be borrowed is \$300. *Id.* at 153.

221. The CCPA provisions on disclosure provide that irregular or unequal periodic installments must be disclosed. CCPA §§ 1638(8), 1639(6), and Reg. Z § 226.8(b)(3), specifically provide for the identification of a "payment more than twice the amount of an otherwise regularly scheduled equal payment" as a "balloon payment" and provide that conditions for refinancing, if any, shall also be disclosed. The only weakness of the federal regulation is that it does not require the creditor to allow refinancing.

222. FLA. STAT. § 519.08 (1971). For additional Florida statutes regulating balloon

To prevent any abuse of balloon payments, the CFA simply provides that "[e]very loan made pursuant to this chapter shall be repaid in monthly installments as nearly equal as mathematically practicable."²²³ On balance this general prohibition is desirable even in light of legitimate uses where a particular debtor's income and ability to repay are subject to fluctuation.

D. Multiple Agreements

An example of the possible misuse of multiple agreements arises in the following context. Under the CFA Florida has, for a \$600 loan, a rate limitation of 30% on the first \$300 and 24% on the second \$300. But if two \$300 loans can be arranged at one sitting, the creditor could receive 30% on each. It is conceivable that many agreements could be made and signed nearly simultaneously. A further possible abuse of a graduated rate limitation and multiple agreements is where the husband would sign an agreement for one loan and the wife would sign an agreement for another, when both agreements are really part of one basic transaction.²²⁴ These practices were prohibited by both the SLA²²⁵ and chapter 519.²²⁶ This policy is carried over to the CFA.²²⁷

No licensee shall induce or permit any borrower to split up or divide any loan. No licensee shall induce or permit any person, or any husband and wife, jointly or severally, to become obligated to him, directly or contingently or both, under more than one (1) contract of loan at the same time, for the purpose or with the result of

payments see, e.g., FLA. STAT. §§ 520.08(3), .34(3), .78(2) (1971).

223. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.36); RULES § 3-2.19. This language is very similar to that of the NCA § 2.402 except that subsection 2 provides for exclusions where a collateral agreement as to seasonal increases in payments coincides with income fluctuation. The National Commission on Consumer Finance would not go this far, however. It suggests

[w]ith respect to a consumer credit transaction, other than one primarily for an agricultural purpose or one pursuant to open end credit, if any scheduled payment is more than twice as large as the average of earlier scheduled payments, the consumer should have the right to refinance the amount of that payment at the time it is due without penalty. The terms of the refinancing should be no less favorable to the consumer than the terms of the original transaction. These provisions do not apply to a payment schedule which, by agreement, is adjusted to the seasonal or irregular income of the consumer.

CONSUMER CREDIT IN THE U.S. 39; *accord*, UCCC §§ 2.405, 3.402.

224. Both CCPA §§ 1638(a)(7), 1639(a)(5), and Reg. Z § 226.8(b) prohibit the division of consumer credit transactions in such a manner as to avoid their disclosure provisions. But note that these federal provisions do not affect rate regulation.

225. FLA. STAT. § 516.14(2) (1971); *see also* FLA. STAT. § 516.21 (1971).

226. FLA. STAT. § 519.08(5) (1971).

227. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(6)). *See also* Fla. Laws 1973, ch. 73-192, § 11 (§ 516.21).

obtaining a greater finance charge than would otherwise be permitted by this section.²²⁸

X. PENALTIES

The general usury statute²²⁹ provides that any interest extracted in excess of the maximum allowable charges gives the debtor a right of action for double the amount of interest received in excess of that allowed by law. The debtor is also entitled to attorney's fees when he brings a successful action under this section. In addition, the lender "forfeit[s] the entire interest so charged, or contracted to be charged," and is entitled to recover only the principal sum under the loan agreement.²³⁰

Furthermore, any person who wilfully and knowingly charges, takes or receives interest in excess of 25% but less than 45% per annum is guilty of a misdemeanor and punishable by not more than sixty days in prison or a maximum fine of \$500 or both.²³¹ If the interest rate is 45% or more, the creditor is guilty of a felony and can be imprisoned up to five years or fined \$5,000 or both.²³² Also, any person who knowingly and wilfully makes an extortionate extension of credit or conspires to do so can be imprisoned up to fifteen years or fined \$10,000 or both.²³³

Any loan which exacts interest in excess of 25% per annum, unless it is entered into under the authority of one of the statutory exceptions, is unenforceable, as to both interest and principal.²³⁴

The SLA, chapter 519 and the CFA are specific exceptions to the general usury statutes,²³⁵ and licensees are subject to its provisions only to the extent that the interest charged exceeds that authorized by the various acts.²³⁶

In addition to the penalties enumerated above, under the SLA,²³⁷

228. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(6)). This provision is very similar to NCA § 2.413. Compare UCCC §§ 2.402, 3.409, 3.509. The UCCC provisions are subject to criticism because they do not link the transactions of husband and wife when part of substantially the same transaction.

229. The general usury law of Florida is embodied in FLA. STAT. ch. 687 (1971). The SLA, chapter 519 and the CFA are excepted from its application by FLA. STAT. §§ 516.02, 519.03, 519.08 (1971), and Fla. Laws 1973, ch. 73-192, § 9.

230. FLA. STAT. § 687.04 (1971).

231. FLA. STAT. § 687.071(2) (1971).

232. FLA. STAT. § 687.071(3) (1971).

233. FLA. STAT. § 687.071(4) (1971).

234. FLA. STAT. § 687.071(7) (1971).

235. FLA. STAT. §§ 687.031, 516.02, 519.03, 519.08 (1971); Fla. Laws 1973, ch. 73-192, § 9.

236. FLA. STAT. §§ 687.031, 687.071 (1971).

237. FLA. STAT. § 516.14(1) (1971).

chapter 519²³⁸ and the CFA,²³⁹ if the creditor contracting with a debtor is in violation of the maximum rate allowed, the obligation is void and the creditor has no right to collect either the principal or interest thereon. Each of these acts provides that if such an overcharge occurred by accidental or bona fide error, the licensee can refund the overcharge within five days of the discovery of the error without violating the act.²⁴⁰

A violator of the SLA or chapter 519 was subject to punishment or a fine of \$500 and/or imprisonment of sixty days.²⁴¹ The CFA leaves these sanctions unchanged.

The Department had the power to revoke a license upon ten days notice and an opportunity to be heard if the licensee either knowingly or without due care violated any provision of the SLA or chapter 519.²⁴² The CFA has not changed this authority. The CFA, like its predecessors, provides that any revocation of a license is subject to judicial review.²⁴³

Furthermore, the Department has authority to issue desist orders and to seek injunctive relief from an appropriate court against anyone the Department has reasonable cause to believe is violating or is about to violate any provision of the particular act.²⁴⁴

XI. MANAGER QUALIFICATIONS

*A person may be born with a bossy disposition, but many other qualities must be added by study and work.*²⁴⁵

The CFA incorporates a new provision relating to the qualification of each loan office's manager.

238. FLA. STAT. §§ 519.06, 519.08(4) (1971).

239. Fla. Laws 1973, ch. 73-192, § 7 (§ 516.031(5)).

240. FLA. STAT. §§ 516.14(1), 519.08(4) (1971); Fla. Laws 1973, ch. 73-192, § 7 (§ 516-031(5)). RULES § 3-2.20 provides:

Should a licensee charge, contract for, or receive interest or charges in excess of those permitted, and such overcharge is a result of a bona fide error, the loan contract shall remain valid and no penalty shall result, provided that the licensee shall refund or credit the borrower with the amount of such overcharge within five (5) days of the licensee's discovery of such error. In the event that the discovery of such overcharge was the result of a complaint by a borrower or of the Department, the Department shall investigate the circumstances surrounding the making of the overcharge and shall determine whether it was the result of bona fide error.

241. FLA. STAT. §§ 516.19, 519.06 (1971).

242. FLA. STAT. § 516.07(1)(a) (1971).

243. FLA. STAT. §§ 516.25, 516.07(7), 519.14 (1971) (unchanged by CFA).

244. FLA. STAT. § 516.23 (1971) (unchanged by CFA). See also FLA. STAT. § 519.12(5) (1971).

245. THE ROYAL BANK OF CANADA MONTHLY LETTER, June 1973, at 1.

Upon application for an original or renewal license, each applicant or licensee shall designate or appoint a manager for each location to be licensed. Each such manager shall have been employed by a licensee under this chapter or under chapter 519, Florida Statutes, or by a subsidiary, affiliate, parent, or partner of the licensee for a total period of at least twelve (12) months or shall have successfully passed an examination based on the law and provisions of this chapter or chapter 519, Florida Statutes, and rules and regulations thereunder. The foregoing requirement shall not apply to any person employed as such principal manager of a licensee on the effective date of this provision.²⁴⁶

This provision should not be burdensome and will ensure that each new manager has at least some familiarity with the statutes and procedures governing his charge. This knowledge would seem to be particularly important when considering the intricacy of the new consumer protection provisions. The statute should have likewise required similar testing of *all* existing managers on these new provisions. Hopefully, the same result will be achieved by educational programs conducted by the Department, by associations and by companies themselves.

XII. LICENSING AND ADMINISTRATION

Under the SLA, chapter 519 and presently under the CFA the Department is given the authority to regulate licensing,²⁴⁷ investigate violations,²⁴⁸ make routine examination of records²⁴⁹ and promulgate rules and regulations.²⁵⁰

Any piece of legislation dealing with licensing must confront the question of who is to be licensed and by what standards the applicants are to be measured. The SLA and chapter 519 required a showing of "financial responsibility, experience, character and general fitness . . . such as to command the confidence of the public"²⁵¹ and "convenience and advantage to the community,"²⁵² plus a minimum capital require-

246. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.231).

247. FLA. STAT. §§ 516.03, 519.07 (1971); Fla. Laws 1973, ch. 73-192, § 3.

248. FLA. STAT. §§ 516.11(1), 519.12(4) (1971); Fla. Laws 1973, ch. 73-192, § 5.

249. FLA. STAT. §§ 516.11(2), 519.12(3) (1971). Fla. Laws 1973, ch. 73-192, did not change FLA. STAT. § 516.11(2) (1971).

250. FLA. STAT. §§ 516.22(1), 519.12(6) (1971). Fla. Laws 1973, ch. 73-192, did not change FLA. STAT. § 516.22(1) (1971).

251. FLA. STAT. § 519.07(4)(a) (1971).

252. FLA. STAT. §§ 516.05(2)(b), 519.07(4)(b) (1971).

There appears to be only one Florida court decision involving "convenience and advantage." In *Pilafian v. Green*, 141 So. 2d 341 (Fla. 1962), the state comptroller turned down an application for a small loan license for a business to be located on Key Biscayne.

ment.²⁵³ The CFA has retained these standards which limit entry into the consumer lending field and thereby restrict free competition.

The "convenience and advantage" criteria originated in the fifth draft of the Uniform Small Loan Law in 1932²⁵⁴ and was enacted in Florida in 1957.²⁵⁵ The provision was an attempt to curtail excesses resulting from a very competitive market.²⁵⁶ It was feared that free entry would cause a great influx of lenders into the market, drive lenders to illegal means to make profits and stabilize rates at the maximum allowable, which would actually defeat competition.

By limiting the number of offices in any one community through application of the "convenience and advantage" test, it could be argued that benefits of economies of scale would be realized by lowering the cost per loan outstanding. Whether there is such a benefit derived from large operations is questionable.²⁵⁷ And it is even more questionable whether any benefits derived from lower costs would in fact be passed on to the consumer in the form of lower rates, for it may follow that small loan companies will tend to charge the maximum rates nevertheless and reap the profit of their increased efficiency.

Some feel that free entry will lead to grave problems resulting from competition between amateur and professional lenders.²⁵⁸ It has been stated that

these new freedoms would be to the competitive disadvantage of institutions such as banks which would remain subject to restrictive licensing. Early reports from Utah, where the UCCC concept of "free entry" is now in effect, indicate, however, that there has been no great rush into the lending field by non-lending businesses, and no major shifts of consumer credit away from the traditional sources of credit or from one such source to another. This is not surprising, as there

The district court of appeal affirmed the circuit court by upholding the denial upon the fact that Key Biscayne, even though having no money lenders licensed at that time, was inhabited by several hundred people who were of the expensive luxury home class and had no need for this company. Also there were 177 lenders within Dade county that were available to the inhabitants of Key Biscayne. Even though the court said it based its affirmation on the definition of "community" it seemed to place great weight on the lack of demand for such service in the immediate area.

253. FLA. STAT. §§ 516.05(2)(c), 519.07(4)(c) (1971).

254. Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4, 17 (1954).

255. Fla. Laws 1957, ch. 57-201, § 4.

256. Sullivan, *Administration of a Regulatory Small Loan Law*, 8 LAW & CONTEMP. PROB. 146, 148 (1941).

257. CONSUMER CREDIT IN THE U.S. 114.

258. Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53, 62 (1969).

will be a natural tendency for creditors, because of economies of operation, to limit their activities to fields of their special expertise.²⁵⁹

A further fear is that with a large number of lenders in the market, it will become hard for the consumer to tell who is a legitimate lender and who is a loan shark. This confusion will provide an atmosphere which is conducive to loan sharking. In criticizing this argument, however, one commentator noted that

[l]oan sharks operate illegally anyway, and do not want to submit to the controls of licensing, reports, inspection and the like. It is hard to see how an increase in the number of legal lenders through free entry can help the loan sharks who continue to operate illegally; and it is hard to see how one who was willing to be an oppressive and illegal lender outside the law is likely to be any more dangerous in the unusual case where he chooses to take a license and becomes subject to the law's disciplines.²⁶⁰

The limited entry aspects of the CFA run contrary to that espoused by the UCCC. The Code provides for free entry into the field by merely requiring the applicant to pass the test of financial responsibility, character and fitness.²⁶¹ The stated rationale for the Code's position is to foster free entry into the credit market and thereby hopefully reduce the rates.²⁶² As stated in the comments to the Code:

This section [on licensing] is intimately related to disclosure . . . and to maximum charges The purpose is to facilitate entry into the cash loan field so that the resultant rate competition fostered by disclosure will generally force rates below the permitted maximum charges. . . .

A secondary purpose is to reduce the likelihood of establishing localized monopolies in the granting of cash credit. Such monopolies tend to push rates charged to the maximum permitted levels and to establish conditions under which some share of the anticipated

259. Address by Robert N. Winston, Vice-President of American Finance Management Corporation, to the Joint Kansas-Nebraska Association, June 17, 1970, as cited in Peters, *Uniform Consumer Credit Code*, 28 WASH. & LEE L. REV. 75, 90 (1971). The Deputy Administrator of the Consumer Credit Bureau of the State of Utah noted that there had been no rush for supervised lender licenses in Utah. Letter from William C. Wideman to Division of Statutory Research and Drafting of the Commonwealth of Virginia, as cited in Peters, *Uniform Consumer Credit Code*, 28 WASH. & LEE L. REV. 75, 90 (1971).

260. Kripke, *Consumer Credit Regulation: A Creditor-Oriented Viewpoint*, 68 COLUM. L. REV. 445, 486-87 (1968).

261. UCCC § 3.503(2).

262. UCCC § 3.503, Comments 1 & 2.

monopoly profits are devoted to direct or indirect pressures to obtain the license.²⁶³

An even more lenient position is taken by the National Commission on Consumer Finance which

recommends that the only criterion for entry (license) in the finance company segment of the consumer credit market be good character, and that the right to market entry not be based on any minimum capital requirements or convenience and advantage regulations.²⁶⁴

Once a license²⁶⁵ has been issued and applicable fees²⁶⁶ have been collected, the Department under the CFA is given the responsibility of examining books, records, accounts and files of licensees.²⁶⁷ The Department is required to conduct such an examination at least twice a year.²⁶⁸

Mandatory examinations are desirable because if such examinations

263. *Id.*

264. CONSUMER CREDIT IN THE U.S. 138. The Commission recommended this in conjunction with increased maximum rate allowances.

265. FLA. STAT. § 516.09(1) (1971) requires a license for each place of business. Advocates of this view argue that without this requirement, it would virtually be impossible to keep lenders under control. The UCCC advocates a single license concept, requiring only one license per lender even though he operates more than one office in the state. UCCC § 3.502, Comment 3. An opponent of this single license concept has stated:

In order to effectively supervise the business, the Administrator should know at all times where supervised loans are being made. The code should require a place of business in the state, since, obviously, the Administrator has no official standing outside the borders of his own state. The code does not require such an in-state place of business; it mandates but one license for the entire state, regardless of the number of offices; and demands notice of each location once a year (changes occurring between any notification dates, however, need not be reported to the Administrator). Thus, it is possible under the UCCC for a lender to make door-to-door loans or to fix up a bus or other vehicle as a traveling loan office, moving it constantly around the state. Furthermore, since there is no requirement that any office be within the state, he could headquarter his operations out of state. This will make enforcement difficult, if not impossible.

Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53, 63 (1969).

266. The CFA requires an annual license fee of \$175.00 and a nonrefundable investigation fee of \$200.00. Fla. Laws 1973, ch. 73-192, § 3. SLA and chapter 519 required a nonrefundable investigation fee of \$100.00 and an annual license fee of \$100.00. FLA. STAT. §§ 516.03(1), 519.07(1) (1971).

267. FLA. STAT. § 516.11(1) (1971) was amended by Fla. Laws 1973, ch. 73-192, § 5, to make it clear that the Department has access to all records of licensees whether within or without the state.

268. FLA. STAT. § 516.11(2) (1971) (unchanged by CFA). At the time of each examination every licensee is required to pay to the Department a fee based upon the amount of outstanding loans due the licensee at that time.

were abolished, violations would surely become much more numerous and control of the credit market would be totally relinquished.

There is a tremendous difference between regular examinations and the right to investigate. . . . It is only through regular examinations that contravention of the code will be uncovered. . . .²⁶⁹

Those who support abolition of annual examinations believe that violations will be nonetheless detected by the Department given responsibility for policing the Act, the result being a great savings in time and expense devoted to bookkeeping and examinations.²⁷⁰

To aid the Department in the administration of the CFA, each licensee is required to keep records in accordance with accepted accounting principles²⁷¹ and submit an annual report stating its financial position.²⁷² The CFA provides a five dollar per day penalty for unjustifiably delinquent annual reports.²⁷³

In addition the Department is given the power to issue regulations,²⁷⁴ which are promulgated by order. A copy of every order promulgating a regulation must be mailed to every licensee at least fifteen days before its effective date.²⁷⁵

XIII. CONSUMER CREDIT COUNSELING

Many of the financial problems of the credit minded consumer stem from a lack of understanding of money management and fiscal soundness. In times past, even those who had a basic understanding of such matters were unable to protect themselves in many instances because of the hidden credit charges, unusual methods of stating rates of interest, and other devices, such as balloon payments, which seemingly were utilized just to foster confusion. The Federal Truth in Lending Act, which requires the disclosure of basic credit information in all

269. Harper, *The Uniform Consumer Credit Code: A Critical Analysis*, 44 N.Y.U.L. REV. 53, 64 (1969).

270. The National Commission on Consumer Finance computed the number of man-days per loan office each state consumer credit administrator had available per year to examine consumer finance companies. The median figure was 2.64 man-days available per office. CONSUMER CREDIT IN THE U.S. 56. Florida's man-day calculation was 2.63. *Id.* at 78. "[T]he Commission recommends that legislatures and administrators in states with less than 2 1/2 man-days available per year per small loan office reassess their staffing capabilities with the goal of improving their ability to fulfill the examination responsibility prescribed by law." *Id.* at 56.

271. FLA. STAT. § 516.12(1) (1971) (unchanged by CFA).

272. Fla. Laws 1973, ch. 73-192, § 6 (§ 516.12(2)).

273. Fla. Laws 1973, ch. 73-192, § 6 (§ 516.12(2)).

274. FLA. STAT. § 516.22(1) (1971) (unchanged by CFA).

275. FLA. STAT. § 516.22(2) (1971) (unchanged by CFA).

consumer credit transactions, has given these persons access to the information they need to operate on a sound basis. But for those who do not know the fundamentals of money management, the disclosures would have little meaning, except perhaps in comparing one "impropriety" with another. To assist these persons to become more proficient in their money matters, consumer education and counseling is a must. In this light, the National Commission on Consumer Finance has recommended "expanded treatment of consumer credit at both the junior and senior high school levels."²⁷⁶ Furthermore, "state agencies should continue their emphasis on adult education for low income consumers, should try to reach more of them, and should develop useful programs for the elderly."²⁷⁷ Hopefully, statewide programs emphasizing consumer education will be implemented in the near future for the state of Florida.

To date, industry and its regulators have been more active in the consumer education field than educators. Many Florida banks have already set up counseling services pursuant to "requests" from the Comptroller's office, and with the passage of the following provisions in the CFA, small loan companies are likely to follow this example.

The department shall be responsible for promoting a consumer credit counseling service for the purpose of promoting and helping establish consumer credit counseling services for individuals in areas where a need has been established. The purpose of the consumer credit counseling service shall be to:

- (1) Assist and educate individual consumers as to money management.
- (2) Assist individual consumers in consolidating obligations when a situation exists where the individual consumer is in need of such assistance; and
- (3) Work with consumer credit grantors in an effort to establish better relations with the individual consumer and with state and federal regulatory agencies.²⁷⁸

Even though the Act appears to be a directive to the Department, through its rule making powers, the Department can pass the mandate on down to the companies that it regulates.

276. CONSUMER CREDIT IN THE U.S. 195. Even though the passage of legislation establishing a required course on the high school level dealing with finance and credit practices in Florida may be desirable, the National Commission on Consumer Finance has stated that it is "preferable to delegate basic consumer education to curriculum areas of home economics, business, and social studies" because of the broader coverage of pupils rather than make mandatory a course in which the student may become disinterested. *Id.*

277. *Id.* at 197.

278. Fla. Laws 1973, ch. 73-192, § 12 (§ 516.32).

Pursuant to this new legislation, there are plans to encourage licensees to set up their own individual programs, and to establish a series of free seminars for interested consumers. One plan that has already been carried into effect is a consumer "hot line." The Department has installed a statewide, toll free WATS line which will be open twenty-four hours a day for the purpose of answering consumer questions about the institutions within the Department's authority.²⁷⁹

It is commendable that someone has undertaken the task of consumer credit education, but it is questionable whether such advice will be free of industry bias and self-interest. It is difficult to imagine creditors telling their customers that they cannot afford any more credit at this time or that the best course of action at this point may be bankruptcy.²⁸⁰ A solution to this problem was offered by the National Commission on Consumer Finance in its recommendation that

business organizations support and encourage nonprofit credit counseling provided it is conducted for the benefit of the consumer and does not serve solely or primarily as a collection agency.²⁸¹

279. Tallahassee Democrat, Aug. 23, 1973, at 21, col. 6. The Department has authority in the areas of banking, state savings and loans, finance, retail credit cards, retail installment buying, mortgage banking and brokers, credit unions, trading stamps, copyright music, cemeteries, and securities registration and investigation.

280. Consider, for example, the following statement:

Adler, *California Creditors Lend Hand to Debtors Facing Bankruptcy*, N.Y. Times, Nov. 6, 1967, at 76, describes Consumer Credit Counsellors, a service in Los Angeles whose board includes representatives of creditor interests, and such interests are among its important contributors. Its manager is a former employee of various creditor interests. The article describes the organization as one "to combat the soaring bankruptcy rate. . . to help deeply indebted people help themselves avoid bankruptcy; to arrange pro-rata plans for orderly debt settlement in cases where individuals need assistance in carrying out extended payment plans. . ."

In other words, these programs encourage debtors to continue paying their debts on a slower scale, instead of wiping out the debts through discharge in bankruptcy.

The Adler article concludes: "The loan sharks are smiling ambivalently. They are attempting to save today's suckers for another slaughter tomorrow."

H. KRIPKE, CONSUMER CREDIT 330 (1970).

281. CONSUMER CREDIT IN THE U.S. 199.